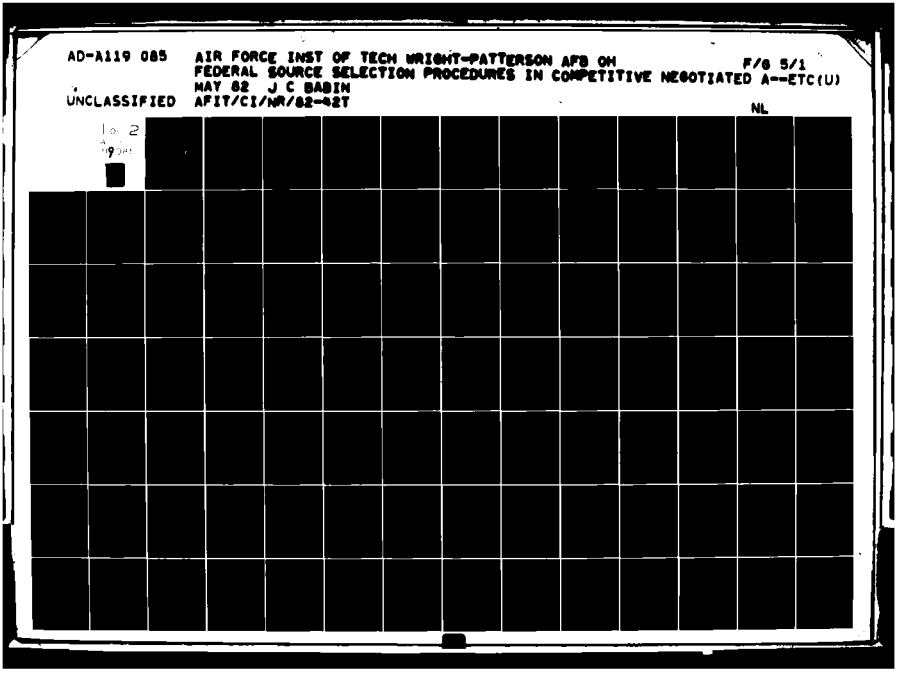
AD-A119 085 AIR FORCE INST OF TECH WRIGHT-PATTERSON AFB OH F/G 5/1
FEDERAL SOURCE SELECTION PROCEDURES IN COMPETITIVE NEGOTIATED A--ETC(U)
MAY 82 J C BABIN
UNCLASSIFIED AFIT/CI/NR/82-42T NL



UNCLASS

SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

REPORT DOCUMENTATION PAGE	READ INSTRUCTIONS BEFORE COMPLETING FORM
1. REPORT NUMBER: AFIT/CI/NR/82-42T	2. GOVT ACCESSION NO.: AD-A119085 (1)
3. RECIPIENT'S CATALOG NUMBER	
4. TITLE (and Subtitle): Federal Source Selection Procedures in Competitive Negotiated Acquisitions	5. TYPE OF REPORT & PERIOD COVERED: THESIS/DISSERTATION
	6. PERFORMING ORG. REPORT NUMBER
7. AUTHOR(s): Maj James Clarence Babin	8. CONTRACT OR GRANT NUMBER(s)
9. PERFORMING ORGANIZATION NAME AND ADDRESS: AFIT STUDENT AT: The National Law Center, George Washington University	10. PROGRAM ELEMENT, PROJECT, TASK AREA & WORK UNIT NUMBERS
11. CONTROLLING OFFICE NAME AND ADDRESS: AFIT/NR, WPAFB OH 45433	12. REPORT DATE: May 1982
	13. NUMBER OF PAGES: 109
14. MONITORING AGENCY NAME & ADDRESS (if different from Controlling Office)	15. SECURITY CLASS. (of this report): UNCLASS
	15a. DECLASSIFICATION/DOWNGRADING SCHEDULE

16. DISTRIBUTION STATEMENT (of this Report)

APPROVED FOR PUBLIC RELEASE; DISTRIBUTION UNLIMITED

17. DISTRIBUTION STATEMENT (of the abstract entered in Block 20, if different from Report)

18. SUPPLEMENTARY NOTES

APPROVED FOR PUBLIC RELEASE: IAW AFR 190-17

30 AUG 1982

LYNN E. WOLAVER
Dean for Research and
Professional Development
AFIT, Wright-Patterson AFB OH

19. KEY WORDS (Continue on reverse side if necessary and identify by block number)

20. ABSTRACT (Continue on reverse side if necessary and identify by block number)

ATTACHED

DTIC ELECTE SEP 9 1982 H

AD A119085

FILE COPY

DD FORM 1 JAN 73 1473 EDITION OF 1 NOV 65 IS OBSOLETE UNCLASS

82 09 07 428 SECURITY CLASSIFICATION OF THIS PAGE (When Data Entered)

THESIS ABSTRACT

Title: Federal Source Selection Procedures in Competitive Negotiated Acquisitions

Author: James Clarence Babin, Major, USAF

DATE: 1982

No. of Pages: 109

Degree Awarded: Master of Laws

Institution: The National Law Center, George Washington University, Washington, D.C.

Summary:

The objectives of this research were to identify and offer possible solutions to legal problems encountered by Federal agencies in the selection of sources for the award of contracts in major competitive negotiated procurements. The report is separated into three main areas. The first concerns the creation of a source selection system, and it includes an analysis of the limits on agency discretion in the determination of minimum needs, the development of evaluation criteria, the composition of evaluation boards, and a survey of commonly used methods of evaluation. The second main area discusses the manner of disclosing the chosen system to industry. Subtopics include commonly used methods of disclosure and specific discussions concerning the disclosure of evaluation subcriteria, the relative importance of cost/price, and the necessity for disclosure of the method of evaluation to be utilized. Finally, the third area analyzes the legal limitations on the actual use of the chosen system. Source selections are examined within the framework of rationality and consistency with disclosed criteria. The procurement decisions of the Comptroller General of the United States were extensively surveyed, as were specific source selection regulations of the Department of Defense, the U.S. Air Force, the U.S. Army, the U.S. Navy, the National Aeronautics & Space Administration, the Department of Energy and the Department of Health and Human Sciences.

AFIT/CI/NR/82-42T

AFIT RESEARCH ASSESSMENT

The purpose of this questionnaire is to ascertain the value and/or contribution of research accomplished by students or faculty of the Air Force Institute of Technology (ATC). It would be greatly appreciated if you would complete the following questionnaire and return it to:

AFIT/NR
Wright-Patterson AFB OH 45433

RESEARCH TITLE: Federal Source Selection Procedures in Competitive Negotiated Acquisitions

AUTHOR: Maj James Clarence Babin

RESEARCH ASSESSMENT QUESTIONS:

1. Did this research contribute to a current Air Force project?

( ) a. YES ( ) b. NO

2. Do you believe this research topic is significant enough that it would have been researched (or contracted) by your organization or another agency if AFIT had not?

( ) a. YES ( ) b. NO

3. The benefits of AFIT research can often be expressed by the equivalent value that your agency achieved/received by virtue of AFIT performing the research. Can you estimate what this research would have cost if it had been accomplished under contract or if it had been done in-house in terms of manpower and/or dollars?

( ) a. MAN-YEARS _____ ( ) b. $_____

4. Often it is not possible to attach equivalent dollar values to research, although the results of the research may, in fact, be important. Whether or not you were able to establish an equivalent value for this research (3. above), what is your estimate of its significance?

( ) a. HIGHLY SIGNIFICANT ( ) b. SIGNIFICANT ( ) c. SLIGHTLY SIGNIFICANT ( ) d. OF NO SIGNIFICANCE

5. AFIT welcomes any further comments you may have on the above questions, or any additional details concerning the current application, future potential, or other value of this research. Please use the bottom part of this questionnaire for your statement(s).

NAME GRADE POSITION

ORGANIZATION LOCATION

STATEMENT(s):

FEDERAL SOURCE SELECTION PROCEDURES IN COMPETITIVE NEGOTIATED ACQUISITIONS

By

JAMES CLARENCE BABIN

B.S. June, 1966, Louisiana State University in New Orleans

Juris Doctor, June 1968, Tulane University

A Thesis submitted to

The Faculty of

The National Law Center

of the George Washington University in partial satisfaction of the requirements for the degree of Master of Laws

February, 1982

Thesis directed by
Ralph Clark Nash, Jr.
Professor of Law

TABLE OF CONTENTS

FOREWORD

Chapter

I. INTRODUCTION. 1

II. CREATION OF A SOURCE SELECTION SYSTEM 10

A. Agency Discretion
B. Determination of Minimum Needs
C. Development of Evaluation Criteria
1. Common Types of Criteria
2. Cost/Price as a Criterion
3. Past Performance as a Criterion
4. Other Considerations

D. Personnel and Procedures
1. General Considerations
2. Bias and Conflicts of Interest

E. Methods of Evaluation
1. General Considerations
2. Common Techniques
a. Adjectival/Narrative
b. Numerical Formulae
c. Combined Methods
3. Cost/Price Evaluations - Special Problems
a. General Considerations
b. Cost/Price Analysis
c. Normalization Techniques

III. DISCLOSURE OF THE SYSTEM. 56

A. Background
B. Methods of Disclosure
1. Absence of any Indication
2. Descending Order of Importance
3. Point Scores or Percentages
4. Adjective or Narrative
C. The Relative Importance of Cost/Price
D. Disclosure of Subcriteria
E. Disclosure of Evaluation Methods

IV. USE OF THE SYSTEM. 74

A. Consistency
B. Rationality
C. Discretion: A Final Word

V. CONCLUSION 90

FOOTNOTES. 94

FOREWORD

The author is a Major, Judge Advocate, in the United States Air Force, currently assigned to the Electronic Systems Division, Air Force Systems Command, Hanscom Air Force Base, Massachusetts

The views expressed herein are solely those of the author and do not purport to reflect the position of the Department of Defense, or any other agency of the United States Government.

THESIS ABSTRACT

Title: Federal Source Selection Procedures in Competitive Negotiated Acquisitions

Author: James Clarence Babin, Major, USAF

DATE: 1982

No. of Pages: 109

Degree Awarded: Master of Laws

Institution: The National Law Center, George Washington University, Washington, D.C.

Summary:

The objectives of this research were to identify and offer possible solutions to legal problems encountered by Federal agencies in the selection of sources for the award of contracts in major competitive negotiated procurements. The report is separated into three main areas. The first concerns the creation of a source selection system, and it includes an analysis of the limits on agency discretion in the determination of minimum needs, the development of evaluation criteria, the composition of evaluation boards, and a survey of commonly used methods of evaluation. The second main area discusses the manner of disclosing the chosen system to industry. Subtopics include commonly used methods of disclosure and specific discussions concerning the disclosure of evaluation subcriteria, the relative importance of cost/price, and the necessity for disclosure of the method of evaluation to be utilized. Finally, the third area analyzes the legal limitations on the actual use of the chosen system. Source selections are examined within the framework of rationality and consistency with disclosed criteria. The procurement decisions of the Comptroller General of the United States were extensively surveyed, as were specific source selection regulations of the Department of Defense, the U.S. Air Force, the U.S. Army, the U.S. Navy, the National Aeronautics & Space Administration, the Department of Energy and the Department of Health and Human Sciences.

CHAPTER 1

INTRODUCTION

One of the most complex, costly and controversial aspects of Federal Government procurement is the selection of a source for award of a contract in a competitive negotiated procurement. Anyone doubting this statement need only peruse the Government procurement decisions of the Comptroller General of the United States over the past two decades. Protests against the award of negotiated contracts based upon alleged improper source selection procedures by Federal procuring activities abound. Yet, it is not difficult to understand why such protests continue. For many potential contractors, the award of a Government contract could mean the very survival of their businesses. Thus, in a high-stakes, complicated game, disagreements are inevitable. However, the recurrent nature and number of source selection protests may indicate that the basic system itself needs improvement.

In many major acquisitions, agencies prepare detailed solicitations which purport to explain the Government's needs to industry, even though they may not really be certain what these needs are, or when they will be required. Contractors reciprocate by preparing equally detailed and expensive responses, attempting to demonstrate that they really do understand what those indefinite needs are and how to satisfy them in the best possible manner.

Faced with the task of deciding which response in reality satisfies or will probably satisfy those needs, Government agencies have proved quite imaginative in their attempts to simplify decision-making processes which by their very nature defy simplification. In so doing, they have created problems for themselves, perhaps needlessy in some instances, and the problems persist. Indeed, it has been seriously suggested that top defense contractors not compete for major system contracts, but simply be awarded them on a rotational basis.[1] This review will attempt to examine the basic elements of source selection procedures used by Federal Government agencies, with the dual objectives of identifying areas of controversy, and, hopefully, suggesting possible alternative solutions to those problem areas.

Competitive negotiated procurement normally contains the following major events:

(a) Identification of a need and creation of a plan to satisfy that need.

(b) Communication of the need to industry, via a solicitation. This is usually done by issuing a Request for Quotations (RFQ), or as will be dealt with most in this review, a Request for Proposals (RFP).

(c) Evaluation of proposals and the establishment of a competitive range. Those proposals found to fall outside the competitive range are eliminated from competition.

(d) The conduct of written and/or oral dicussions with those offerors within the competitive range.

(e) The evaluation of best and final offers following discussions.

(f) Selection of the offer most advantageous to the Government.

(g) Award of the contract.

Many of the rules which concern source selection procedures apply to all phases of competitive negotiation. This review will not consider those aspects which are more aptly categorized as negotiation procedures, such as establishment of the competitive range, and the conduct of oral and written discussions, nor will it consider small purchase procedures. What will be discussed are those elements of negotiated procurement which directly involve the source selection process. Three distinct areas will be explored. First, creation of a source evaluation and selection system will be discussed. This entails a study of the basic structures of various agency evaluation systems, including its personnel and techniques of evaluation. Next, disclosure of the particular system is examined. This involves the methods chosen to convey the agency's needs to industry, and to what extent industry is and should be made aware of the source selection system. Finally, utilization of the chosen system is analyzed. Here the concern is the extent to which the disclosed system need be adhered to in the final selection.

Statutory language relative to source selection

procedures is almost nonexistent. The Armed Services Procurement Act, 10 U.S.C. §§2301-2314, contains the following language in §2304(g):

> In all negotiated procurements in excess of $10,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered: Provided, however, that the requirements of the subsection with respect to written and oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion.

Obviously, this broad statement of policy leaves room for much definitization of competitive negotiation procedures. To some extent, this statutory void has been filled by agency regulations and by the decisions of the Comptroller General. As such, pertinent regulations of three military and three civilian agencies were examined in preparation for this review, as were the decisions of the Comptroller General. The Comptroller General's decisions comprise the principal

decisional materials because of his pre-eminence in the area of pre-award protests. Federal courts have played a role in the pre-award disputes process, but it has proven to be a limited one. Under certain circumstances, an aggrieved bidder may recover the costs of preparing his offer, or he may obtain injunctive relief; however, Federal Courts will usually limit their intrusion into the source selection process only to situations where the aggrieved offeror demonstrates that there was no rational basis for the agency's decision, and, even where no such basis exists, relief may nevertheless be refused if an overriding public interest is present.[2] It is the Comptroller General who has been the guiding force in the creation of most of the specific rules which have filled the statutory void over the past two decades and who has shaped the structure of agency regulations.

Finally, a brief introductory note about the regulations examined. Regulatory matters having general application within the Department of Defense (DOD) include the Defense Acquisition Regulation (DAR), 1976 edition, and Department of Defense Directive (DODD) 4105.62, dated January 6, 1976, entitled, Selection of Contractual Sources for Major Defense Systems. On the civilian side, the Federal Procurement Regulation, (FPR), 1964 edition, has overall application to most civilian procuring agencies. The National Aeronautics and Space Administration (NASA) has its own procurement regulations, and they also were reviewed. Some procuring agencies publish detailed guidance on competitive source

selection procedures. On the military side, all of the DOD components have promulgated regulations which implement DODD 4105.62. The latter details mandatory policy and procedures on competitive source selections with respect to high dollar procurements. As the title indicates, the Directive is applicable to "major defense systems" acquisitions, i.e., those programs designated by the Secretary of Defense and having sufficient magnitude to justify formalized source selection procedures.[3]

Among the DOD components, the Department of the Air Force appears to have the greatest amount of regulatory material specifically devoted to the source selection process. The basic Air Force regulation is Headquarters, U.S. Air Force Regulation 70-15 (AFR 70-15), dated April 16, 1976. It implements DODD 4105.62 and establishes policy and procedures for the conduct of the entire competitive source selection process of major systems.[4] However, for those procurements which do not meet the dollar thresholds prescribed, the regulation specifies that the provisions therein are sufficiently flexible to accomodate a wide range of requirements, and thus may be used as a guide to formally evaluate and select other competitive proposals for programs below the described thresholds.[5] In addition, the Air Force's major subordinate buying commands, Air Force Systems Command (AFSC), which is responsible for the acquisition of all aircraft, missile, space and communications systems, and the Air Force Logistics Command (AFLC), whose responsibility

it is to acquire all supplies and services necessary to support those systems after they have entered the Air Force inventory, have supplemented AFR 70-15 with their own regulations, tailoring the specific procedures to their own needs when allowed and providing guidelines for those procurements which fall below the dollar thresholds of major systems.

The basic Army regulation is Headquarters, Department of the Army Regulation 715-6 (AR 715-6), dated September 21, 1970. It is short and contains only broad objectives and policies, and it too is applicable to high dollar procurements.[6] More specific guidance in source selection procedures is found in a pamphlet published by the Army's principal purchasing command, Headquarters, U.S. Army Materiel Development and Readiness Command (DARCOM), formerly known as the U.S. Army Materiel Command. DARCOM is responsible for the complete life cycle of Army hardware, from research and development to procurement, production, supply and maintenance. It provides supervisory direction to seven subordinate commands in procurement matters. DARCOM Pamphlet 715-3 (P715-3), dated October, 1980, entitled Proposal Evaluation and Source Selection, is a concise handbook covering the entire spectrum of the source selection process. Though not mandatory, the guidance provided is stated to be "based upon the latest experience in the use of organized proposal evaluation and source selection procedures", and is applicable to all major systems, as well as lesser dollar

acquisitions of high complexity, the degree of application being left to the Source Selection Authority.[7]

Procurement for the Navy is conducted by five principal decentralized commands under Headquarters, Naval Material Command (NAVMAT). NAVMAT is a supervisory command, and it establishes acquisition policy and procedures for the subordinate commands. Hence, the basic Naval regulation concerning competitive source selection procedures is issued by NAVMAT, and it is known as NAVMAT Instruction 4200.49, dated February 28, 1977. NAVMAT Instruction 4200.49 implements DODD 4105.62 and establishes Chief of Naval Material policy and guidance on source selection procedures for the acquisition of major defense systems.[8] The formal procedures included in the Instruction may also be applied to any other competitive procurement provided advance approval is obtained by the commander of the particular systems command concerned.[9] NAVMAT's subordinate commands' supplements were also examined; they include: Naval Electronics Systems Command (NAVELEX) Instruction 4200.12c, dated August 31, 1978; Naval Air Systems Command (NAVAIR) Instruction 4200.24, dated July 1, 1977; and, Naval Sea Systems Command (NAVSEA) Instruction 4200.10, dated April 27, 1979.

As to those civilian agencies encompassed by the provisions of the FPR, the Department of Energy (DOE) has published a concise handbook called, Procurement Regulations Handbook, Source Evaluation Board, (DOE PR-0027), dated June 30, 1979. Its provisions are mandatory for major, high value

procurements and optional in others, and they may be modified to fit the particular procurement as long as any such variations do not constitute a departure from the "basic policies and intent" of the handbook.[10] The Department of Health and Human Services (HHS), formerly the Department of Health, Education and Welfare (HEW), has relatively little regulatory guidance on source selection procedures when compared to the agencies noted above. They have published their own procurement regulations, and have consolidated source selection matters in several sections of an internal handbook entitled, The Negotiated Contracting Process: A Guide for Project Officers, 1977 edition. The handbook generally outlines the negotiated procurement process from its inception in the advance planning stages to its post award administration phase.

The last regulatory matters examined in preparation of this review belong to NASA. In addition to their basic procurement regulations, NASA has provided specific instructions on formal source selections in a concise manual entitled, Source Evaluation Board Manual (NHB 5103.6A), 1975 edition. The policies and procedures contained therein are mandatory for competitively negotiated procurements when the estimated cost of the contract, together with the estimated cost of later phased procurement for the project is expected to exceed or equal $5 million, as well as to any other negotiated procurement which a source selection official determines shall be evaluated pursuant to the manual.[11]

CHAPTER II

CREATION OF A SOURCE SELECTION SYSTEM

A. Agency Discretion

Simply stated, the object of negotiated procurement is to select that proposal which is most advantageous to the Government. In making these selections, Government officials are given broad discretion.[12] Indeed, agency discretion is the one thread that binds the entire source selection process together.

A classic example of the range of that discretion can be found in a 1971 protest involving the National Aeronautics and Space Administration.[13] It might be worthwhile tc examine that case in some detail, as it serves as a good introduction to many of the recurrent problem areas in the selection process, such as disclosure of evaluation criteria in their relative order of importance, the listing of subcriteria, the utilization of numerical scoring and weighting, and the discretion of the source selection official in making his decision. In that case, the RCA Service Company (RCA) protested the award of a contract for institutional support services at the George C. Marshall Space Flight Center. Five main evaluation criteria were to be used in evaluating proposals, and the RFP set forth their relative importance in the following manner:

B. Evaluation Criteria - Proposals will be evaluated and ranked against the following criteria and a numerical score assigned. The total weights of the first three criteria are approximately five times greater than the weight of the fourth criteria. In evaluating the first three criteria, primary consideration will be given information received under the first two criteria (Management Plan and Previous Experience), which are approximately equal to each other. Information received under the third criterion (Staffing Plan) will be given somewhat less consideration than either of the first two criteria. In evaluating the last two criteria, primary consideration will be given information received under the fourth criterion (Policies, Procedures and Financial Capability). Significantly less consideration will be given the fifth criterion (Facilities and Equipment).[14]

The RFP then proceeded to describe the important aspects of the criteria, listing several subcriteria under each major criterion. Criteria 1 and 2 contained the following information pertinent to the protest:

1. Management Plan

* * * * *

(f) Small and Minority Business Utilization Plan

- Special consideration will be given to proposals containing firm commitments to small business subcontractors on minority-owned enterprises.

* * * * *

2. Previous Experience - Evaluation of your previous experience will include the extent to which directly related services have been successfully performed and managed during the past several years.[15]

The RFP expanded the above-cited language in other sections, generally requiring information in the scope of work prospective contractors contemplated would be performed by subcontract under set-aside arrangements for small business or minority-owned concerns, and, if an offeror did not so contemplate, information on his reasons therefor. As to previous experience, Section II of the RFP required the offeror to provide a listing of related technical experience and contracts both he and his proposed subcontractors had performed, and was encouraged to furnish a self-analysis of such previous experience.

Proposals were received from three offerors, Hayes International Corporation (Hayes), RCA, and the Federal Electric Corporation (FEC). Those proposals were analyzed in accordance with an evaluation plan established prior to issuance of the RFP. In the plan, the five major criteria were assigned numerical weights indicative of their relative importance. However, the subcriteria were not to be numerically scored, but rather were to be informally evaluated. Following initial evaluation and oral discussions (where, pursuant to NASA directives, deficiencies were not disclosed), RCA was ranked first with a final weighted score of 890 out of a possible 1000, FEC second with an 840 score, and Hayes third with a score of 800. In their evaluation, the members of the Source Evaluation Board (SEB), noted that while Hayes had limited experience in several key aspects of the

Previous Experience criterion, they did propose to subcontract the custodial services to a newly organized minority firm.

In his decision, the Source Selection Official (SSO) concluded that the competition was close, and, in spite of the fact Hayes was ranked last, chose that company for award. He stated that the differences in the proposals were not great, that any weaknesses in Hayes' proposal appeared to be correctable, and that he was particularly impressed by the effort of Hayes in locating and assisting a minority-owned firm for such an important subcontract. Further, he discounted any weaknesses of Hayes as a result of the subcontractor's lack of experience as an "unavoidable consequence of increasing minority-owned business participation."[16]

Following the selection, the "losers" were then debriefed. As is the usual case, it is here where the frustrated offeror gets his first glimpse of the actual, detailed process of evaluation and selection. In its debriefing, RCA was criticized for token utilization of minority-owned concerns. Undoubtedly to no one's surprise, RCA protested to the Comptroller General, alleging essentially that the SSO gave greater weight to the small and minority business subcriterion than was otherwise disclosed, particularly in view of its being placed last under the general criterion; and, further, that the decision to discount the reported weakness of Hayes flowing from the lack of

experience of that company's minority subcontractor was in contravention of the RFP statement that previous experience, including that of subcontractors, was an important evaluation criterion.

The Comptroller General agreed. He reiterated his consistent position that evaluation criteria and their relative importance should be disclosed to offerors, and cited NASA regulations to that effect. He stated the action of the SSO in discounting the inexperience of Hayes' minority group subcontractor reflected a different interpretation of the "Previous Experience" criterion than that utilized by the SEB, and the only reasonable interpretation which could be derived from the RFP. In addition, the Comptroller General noted no indication was given to offerors relative to the extent to which special consideration was to be given to commitments to small or minority-owned enterprises, or that more consideration would be given to commitments to small versus minority-owned concerns, or vice-versa. While agreeing there is no obligation to advise bidders of the relative importance of subcriteria, or to list such subcriteria in descending order of importance if they are to be considered of approximate equal importance, the Comptroller General stated that where one such subcriterion possesses overriding importance, offerors should be so advised. In the absence of such advice, offerors are entitled to assume that all subcriteria will be considered of approximately equal importance. Here, the actions of the SSO clearly demonstrated

that Hayes' utilization of a minority-owned business was a primary factor in selection for award. While noting the SSO has the right to change weights, when this occurs offerors should be informed and allowed an opportunity to submit revised proposals.

Based upon the above, the Comptroller General concluded that the actions of the SSO constituted a departure from "sound procurement policy."[17] However, notwithstanding these improprieties, this departure was not sufficient to invalidate the selection. His reasoning was as follows:

> We cannot state as a matter of law as distinguished from sound procurement policy, that your Administrator is without authority to make an award of this contract to Hayes. The RFP did specify that special consideration would be given to proposals evidencing firm commitments for minority subcontracting, albeit in terms that were not sufficiently precise to warrant clearly the action taken. All of the proposals were meticulously and fairly evaluated by the SEB according to the precise terms of the RFP.
>
> * * *
>
> There can be no question but that the basis upon which an award to Hayes is being proposed has been openly stated, with no implication that the Source Selection Official in making his choice is proceeding in other than a straightforward manner after full and fair evaluation of all proposals. While there may be grounds for disagreement with the reasoning by which the Source Selection Official chose to select Hayes over the other offerors, we cannot conclude that such selection was arbitrary. In view thereof, and recognizing the absence of either a statutory or regulatory direction relative to awards in negotiated procurements

> of this type, we cannot conclude that the departure from what we consider to be sound procurement policy from a competitive standpoint is sufficient in itself to preclude the Source Selection Official from making his selection on the basis stated.[18]

Thus, this broad agency discretion apparently extends to breaches of sound procurement policy, as long as the decision is not arbitrary. Nevertheless, one might wonder if the award to Hayes was "most advantageous" to the Government. Perhaps it can be so only if the accomplishment of recognized social objectives, i.e., the betterment of minority-owned concerns, can be accepted as a legitimate advantage.

For a judicial discussion of the limits of agency discretion by a Federal District Court in its limited pre-award role, see Rudolph F. Matzer & Associates, Inc. v. Warner,[19] where the court noted its duty to interfere in the procurement process when agency officials exercise their discretion "in an abusive, unlawful or irrational manner," and stated examples of such behavior would be where an applicable statute or regulation was violated, or where the record contained no substantial evidence on which the agency official could base his decision.

Again, broad agency discretion can be found in all phases of the source selection process. This chapter will examine that discretion as it relates to the creation of a source selection system.

B. Determination of Minimum Needs

Agency discretion perhaps enjoys its greatest latitude in the initial phase of the creation of a source selection system, or indeed in the initial step of any procurement. That initial step is simply the identification of the minimum requirements or needs that will satisfy the Government's desires. In that regard, it should be recognized that minimum need determinations really involve restrictive competition issues. In essence, the ultimate consideration here is whether or not the specified requirements unduly restrict competition. Minimum needs, as they relate to competition, really encompass restrictions which bear some relevance to the satisfaction of the desired product or service. That is, the term "minimum" does not mean the Government must always settle for only those requirements absolutely necessary in order to function.[20] Indeed, certain minimum needs may require the best available services or products.[21] In any case, it should be remembered that the minimum need considerations discussed herein also concern and ultimately involve such restrictive competition issues.

The Comptroller General has on many occasions reaffirmed his position that the determination of the Government's minimum needs is best done by, and the primary responsibility of, those who are most familiar with the conditions under which those needs are to be used, i.e., Government procurement

officials.[22] His office will not question agency minimum need decisions unless clearly shown to be unreasonable, an arbitrary abuse of discretion, or a violation of a procurement statute or regulation.[23] The protestor has the burden of affirmatively proving unreasonableness.[24] This is a heavy burden, as numerous protestors have discovered, particularly where the procurement involves equipment of a highly technical or scientific nature and the determination must be based on expert and technical opinions.[25] For example, HEW easily justified their need for more advanced characteristics than those found in commercially available scientific equipment through the opinions of individual research microbiologists, for whom the instruments were to be procured.[26]

However, the Comptroller General has on occasion criticized stated agency requirements.[27] In one recent case, the Environmental Protection Agency set forth stringent experience requirements for the acceptability of maintenance personnel.[28] The protestor alleged that the requirements were excessive, and that they were improper in using years of experience as the sole criterion, which gave no credit for education and training. The Comptroller General stated: "[W]hile not deciding the issue, we believe, in the interest of furthering competition, that the EPA should review the experience requirements with a view to reducing them * * * or accepting equivalent education and training to fulfill a

portion of the requirement."[29] Nevertheless, the protest was denied.

Admittedly, these latter cases are rare, and it is clear that the broad discretion "thread" dominates the establishment of minimum needs by the respective Government agencies.

C. Development of Evaluation Criteria

1. Common Types of Criteria

Once those minimum needs are determined, it becomes necessary to express those needs in an understandable manner. In the source selection process, those expressions are commonly called evaluation criteria or evaluation factors. Whether they are labeled as elements, factors, or some other name, these things comprise the basic aspects of the needs which are essential to their fulfillment.

The basic, general areas of evaluation criteria appear in most programs. Usual major categories include Technical, Management, Experience and Past Performance, Cost/Price, and other areas when appropriate. The various risks associated with proposals in relation to major factors, especially Technical, may be also disclosed as evaluation factors in many procurements. Some of the regulations attempt to give guidance in the choice of major factors and subfactors.

The Air Force has described in some detail how it expects their buying commands to establish evaluation criteria. AFR

70-15 provides specific guidance on evaluation criteria to be selected and disclosed. Normally, criteria are classified into general and specific considerations.[30] General considerations include such things as past performance, contractual terms and conditions, and results of preaward surveys. Specific criteria form the basis for the technical evaluation and are classified as Areas, Items and Factors.[31] "Areas" are basic functional disciplines containing elements that will have an impact on the success of the program and the selection process, the most generally encountered areas being technical, operations, logistics, management/production and costs.[32] Technical risk, as it pertains to each proposal, is an evaluation criterion, and is rated based on the "offeror's risk assessment and the credibility of his proposed approach for eliminating or avoiding such risks."[33] Obviously, a more specific breakdown is necessary for proper analysis and those breakdowns are called "Items." An illustration of such a breakdown can be: Area-Operations, Item-Maneuverability.[34] Each of the Items of the Areas determined to be essential to the selection process may nevertheless still be fairly broad in scope. As such, further segmentation may be necessary, and those segmentations are called "Factors" by AFR 70-15. Only in rare instances is segmentation below Factor level contemplated. An AFR 70-15 example of a Factor shredout appears as:

Area - Operations
  Item - Maneuverability
    Factor - Turn Radius
    Factor - Excess Power
Item - Survivability
    Factor - Subsystem Redundancy
    Factor - Radar Cross Section
      Subfactor - Front Quarter
      Subfactor - Side View[35]

The establishment and basic structure of criteria and subcriteria in the Army are similar to that of the Air Force. Evaluation criteria are segmented into three basic levels called: areas, elements (items in Air Force terminology) and factors.[36] DARCOM guidance notes that technical, cost and management are traditional major areas, while others might be logistics, operational suitability and test evaluation.[37] Those Naval regulations studied for this review provide no substantive guidance on the selection or format of evaluation criteria.

As to the civilian agencies examined, HHS simply provides that evaluation criteria are to be developed by technical personnel,[38] while DOE notes only that such criteria generally fall into three major categories: technical, business and management, and cost.[39] However, NASA describes four basic groups of evaluation factors in most of their procurements as:

> A. "Mission Suitability Factors." These include both technical and management considerations and they are numerically scored and weighted.[40]

B. "Cost Factors." These are not scored, because the "weight to be accorded them can be judged by the SSO only after he has determined the relative merits of the proposals from a mission suitability standpoint and the significance of differences in this regard, and after he has adjudged the significance of Other Factors."[41]

C. "Experience and Past Performance." These factors are not numerically scored either.[42]

D. "Other Factors." That is, those other considerations which have relevance to the particular contract, such as labor relations, small business considerations, etc. These factors are also not numerically scored, but are subjectively evaluated, like factors 2 and 3 above.[43]

2. Cost/Price as a Criterion

Logically, cost/price is always a factor.[44] Only the relative importance of cost/price changes, depending upon the nature of the acquisition and the type of contract involved. For example, in a research and development contract, cost will usually be of less importance than technical excellence. In cost reimbursement contracts, the realistic expected cost of performance, normally reflected in

Government estimates, is used to evaluate proposals, and not the offeror's estimated cost.[45] Needless to say, the offeror is entitled to know the relative importance of cost, and how it fits into the evaluation process. The relationship of cost/price with other factors and the evaluation thereof are discussed in detail in later sections of this review.

Other types of costs are sometimes used as evaluation factors when appropriate and when listed in the solicitation. Common examples are phase-in costs[46] and costs of ownership.[47] DOD major systems acquisitions contain the evaluation of life cycle costs.[48] Life cycle cost is the total cost of an item over its full life, including the cost of development, acquisition, ownership and, where applicable, the cost of disposal.[49] It might be noted here that when life cycle costs are to be evaluated, the solicitation should indicate that fact as well as the useful life period to be used in the evaluation.[50]

3. Past Performance as a Criterion

Another evaluation criterion which has increased in use in the past years and appears in most major acquisitions is past performance. All of the agencies examined mentioned the use of past performance as a factor when appropriate. DODD 4105.62 requires that DOD components utilize past performance when relevant to the contract.[51] NASA lists past

performance as a basic factor normally present in most procurements.[52] DOE considers it under their "business and management" criterion,[53] and HHS evaluates past performance as part of an offeror's business proposal in each contract.[54] In the Air Force, AFSC attempts to define past performance as:

> [R]elevant past performance means quality of work, essentially comparable to the instant acquisition, completed under and in accordance with a contract. It includes but is not necessarily limited to work in the same or similar acquisition phase or category, for the same or similar item, and of a similar scope, performed by the same company/division profit center, and in a time period reasonably recent to the instant acquisition.[55]

Further, AFSC considers past performance to be important in most cases, as their regulation states: "The past performance criterion shall be equal in ranking or stature to all other criteria if all are equal, or first if ranked in order of importance."[56]

Past performance factors are also elements in the determination of an offeror's responsibility, such determination being made either by the contracting officer or by the Small Business Administration via their Certificate of Competency procedure for small businesses. If so, the obvious question then is what business does an evaluation board or team have in considering those elements during the evaluation phase. The Comptroller General has answered that question on several occasions. Simply stated, criteria which traditionally related to responsibility, i.e., an offeror's ability or capacity to perform, may raise questions of

technical acceptability in the context of negotiated procurements.[57] In one case, HEW determined that a small business offeror was technically unacceptable primarily because of a low rating given in the corporate experience area.[58] The RFP clearly indicated that information on such experience was required and would be evaluated. The offeror protested that he was rejected for reasons bearing on responsibility, and that it was improper to do so at that time. The Comptroller General disagreed, stating:

> In many other cases, we have recognized that contracting agencies may properly utilize evaluation factors which include experience and other areas that would otherwise be encompassed by offeror responsibility determinations when the needs of those agencies warrant a comparative evaluation of those areas.[59]

Accordingly, no impropriety was found in the use of experience factors as proposal evaluation criteria, or in HEW's rejection of the proposal without referring the matter to the Small Business Administration. Thus, when their minimum needs require a comparative analysis of offeror's experience or other responsibility type areas, contracting agencies may utilize, in negotiated procurements, evaluation factors which measure such areas.[60]

Finally, it might be mentioned that the experience of proposed subcontractors may be used in determining whether a prime contractor meets the solicitation's experience requirements.[61] Also, where responsibility-type criteria are

comparatively evaluated, the rule that responsibility determinations should be based on the most current information available is likewise applicable to such comparative evaluations.[62]

4. Other Considerations

Whatever the manner or category preferred, the choice of evaluation factors is obviously a matter of common sense. The specific number and types will naturally depend upon the particular procurement. Logically, the listing of too many can be just as harmful as listing too few, since the former may confuse while the latter invariably might lead to misunderstandings. In any case, they should be as precise and as specific as possible, since factors stated in general terms could cause the solicitation to be defective.[63] Clearly, they should include all significant aspects which will have an impact on the ultimate decision.

D. Personnel and Procedures

1. General Considerations

As procurements become more complex, so do the evaluation structures supporting them. All of the regulations noted previously contemplated the establishment of formal

evaluation boards or teams to rate and evaluate proposals. While agencies again enjoy wide discretion in the use of such boards, the basic framework of the various agency systems is similar, particularly for major acquisitions.

For example, DOD components use essentially identical evaluation structures for major system acquisitions. That structure consists of a decision pyramid made up of a Source Selection Evaluation Board (SSEB) at the base, a Source Selection Advisory Committee (SSAC) in the middle, and a Source Selection Authority (SSA) at the top.[64] The SSEB consists of a group of personnel representing the various functional and technical disciplines necessary for the particular procurement, who are appointed by the SSAC to evaluate proposals and develop summary facts and findings. The SSEB issues an Evaluation Report, which contains detailed narrative assessments of each proposal against evaluation standards, numerical scores when used, and summary appraisals of significant strengths, weaknesses and risks of each proposal.[65] The SSAC is usually a group of senior military or Government civilian personnel appointed to advise the SSA during the source selection process. They analyze the results of the SSEB's evaluations and prepare an Analysis Report.[66] The latter is a formal report which analyzes the findings of the SSEB, summarizes the entire process to date, and draws conclusions, but normally makes no recommendations. As required by DODD 4105.62, the SSA is the official designated to direct the entire process and select the source(s).[67]

Scaled down procedures may be used for small procurements, such as the NAVSEA "CARP", or Contract Award Review Panel, which functions as a combined SSAC and SSEB.[68] Below certain projected dollar values for specific contracts, formalized procedures are usually neither warranted nor necessary. AFSC specifies in their supplement to AFR 70-15 that formal source selection procedures are discouraged for procurements expected to cost less than $1 million.[69]

On the civilian side, DOE utilizes an evaluation and selection structure consisting of a Source Evaluation Board (SEB) and a Source Selection Official (SSO).[70] Again, when the complexity and value of the procurement so warrants, this formal structure will be used. The duties and responsibilities of the SSO are similar, if not identical, to that of the SSA in the military agencies, while the SEB's tasks resemble a combined SSAC and SSEB in the military structure. In HHS, proposals are required to be in two parts, a "technical proposal" and a "business proposal".[71] Technical proposals are simply provided to "technical evaluators", who prepare an evaluation report for the Contracting Officer.[72] Finally, NASA's formalized system consists of an SSO and SEB, similar to the structure of DOE.[73] The SEB is responsible for the solicitation, receipt and evaluation of proposals, and for establishing evaluation criteria and the requisite weights. When needed, the SEB may

be supported by various committees who serve as fact-finding bodies for their related functional disciplines; however, the SEB is required to use its own collective judgment in arriving at its conclusions for purposes of reporting to the SSO.[74]

Even though agencies may utilize formalized evaluation boards and procedures, there is no legal requirement that they do so. The Comptroller General has sanctioned evaluations conducted by one person, if properly qualified,[75] and by outside review committees who submit their findings to agency evaluation personnel.[76] Procedural aspects of proposal evaluation are matters requiring agency discretion, and won't be questioned absent clear evidence of abuse.[77] Thus, where a large number of proposals must be considered, it is not improper or arbitrary to divide them among panel members for evaluation. In that regard, one protest challenged the basic fairness of a procedure whereby 30 proposals were divided among evaluators, and any proposal could be rejected by only one person.[78] In denying the protest, the Comptroller General stated that where the RFP doesn't provide that each proposal will be rated by all evaluators, the fact that some would be read by only one evaluator provided no grounds for relief. Similarly, an HHS requirement that technical evaluators submit narrative evaluations with their raw scores didn't require a narrative from each evaluator; rather, a consensus report containing such narrative reasoning sufficed.[79] Also, some procuring agencies do not provide

their technical evaluators with cost information.[80] Such a procedure is discretionary, as the Comptroller General has stated there is no law which would be contravened by such a disclosure.[81]

Some agencies utilize intermediate panels, such as the SSAC in DOD major acquisitions, which exercise independent judgment in reviewing the findings of the lower evalution panels. Such procedures have also been recognized as being within the discretion of contracting agencies by the Comptroller General.[82]

Not surprisingly, there is broad agency discretion in determining the composition of evaluation boards.[83] Obviously, procuring agencies attempt to utilize the most capable evaluators available and the Comptroller General will not normally become involved in appraising the qualifications of evaluators.[84] Further, internal agency guidelines concerning the composition of evaluation boards do not create substantive rights in offerors; therefore, failure to follow such guidelines provides no basis for objection.[85]

2. Bias and Conflicts of Interest

The Comptroller General will question agency discretion in the area of evaluation personnel if there is a showing of bias or conflict of interest. As to the former,

the protestor has the burden of proof in demonstrating an evaluator has acted in a biased manner.[86] In a protest against the award of a contract by HEW, the Comptroller General stated:

> In regard to what is necessary to make a showing of bias, we have stated that 'It must be emphasized * * * that unfair or prejudicial motives will not be attributed to individuals on the basis of inference or supposition.' A.R.F. Products, Inc., 56 Comp. Gen. 201, 208 (1976), 76-2 CPD 541.[87]

As to conflicts of interest, all officers and employees of the Federal Government are bound by certain standards of conduct which prohibit them from placing themselves in a position of conflict, by virture of their official duties, between their private interests and the public interests of the United States.[88] Agency evaluation personnel find themselves in an inherently sensitive position. Therefore, many regulations require such personnel to be specifically briefed on their duties and responsibilities with regard to real or apparent conflicts of interest.[89] While the Comptroller General has acknowledged that the responsibility for determining whether a conflict of interest exists and for enforcing requisite standards of conduct rests with the procuring agency, he has on occasion commented upon alleged violation of standards as they relate to particular procurements.[90] For example, he has stated that it is incumbent on the agency to avoid even the appearance of favoritism or preferential treatment.[91]

As such, where one of four evaluators disqualified herself from evaluating a specific proposal because of a potential conflict of interest, the agency should have disqualified her from evaluating the remaining proposals.[92] In another case where an agency learned the Contracting Officer's daughter was employed by the ultimate awardee, it would have been preferable to reassign the Contracting Officer.[93] However, no relief was forthcoming in that case since the Contracting Officer denied any wrongdoing, and brought the matter to the attention of her superiors (who then determined no conflict of interest existed).

Even though agencies should avoid even the appearance of a conflict of interest, the mere presence of a "possibility" thereof is insufficient to support a protest.[94] Simple allegations are likewise insufficient as the Comptroller General will not conduct investigations for the purpose of establishing the validity of unsubstantiated statements.[95] Thus, the protestor must present sufficient evidence to affirmatively prove his or her allegations.[96]

E. Methods of Evaluation

1. General Considerations

In the beginning of this chapter it was stated that one common thread seems to bind the source selection process together -- agency discretion. Just as procuring activities

exercise great discretion in selecting and defining their minimum needs, and in shaping the structure of evaluation procedures, so do they enjoy such discretion in the choice of methods and techniques to be used in the actual evaluation of proposals.[97]

Generally, agency determinations during the evaluation process are entitled to great weight.[98] The Comptroller General has repeatedly stated that it is not his function to evaluate proposals to determine their eligibility for award.[99] The judgments of the procuring activities' technicians and specialists as to the adequacy of proposals will be accepted absent a clear showing of unreasonableness.[100] Further, agencies may use their own independent estimates as evaluation aids.[101] These estimates can pertain to costs,[102] and to items which contribute to costs, such as required manhours.[103]

The mere fact that a protestor disagrees with an agency's evaluation does not render the evaluation unreasonable.[104] Where there is a difference in judgment, the procuring agency's good faith judgment must prevail.[105] An excellent and succinct comment by the Comptroller General concerning agency discretion in this area can be found in a 1980 protest by Pacific Consultants, Inc.[106] In it he stated:

> Before discussing the specific complaints raised by Pacific, we note that in resolving cases in which a protestor, as here, challenges the

> validity of a technical evaluation, it is not the function of this Office to evaluate proposals in order to determine which should have been selected for award. The determination of the relative merits of proposals is the responsibility of the procuring agency since it must bear the burden of any difficulties incurred by reason of a defective evaluation. In light of this, we have held that procuring officials enjoy a reasonable degree of discretion in the evaluation of proposals and such discretion must not be disturbed unless shown to be arbitrary or in violation of the procurement statutes and regulations. * * * Thus, our Office will not substitute its judgment for that of the procuring agency by making an independent determination. * * * Additionally, the protestor has the burden of affirmatively proving its case.[107]

The only restrictions on procuring agencies in determining the particular method of evaluation are that the method have a rational basis and that the evaluation be conducted in a good faith manner and in accordance with disclosed evaluation criteria.[108] These restrictions are further discussed in succeeding chapters of this review.

2. Common Techniques

Procuring agencies have tried many techniques in an attempt to represent the essentially subjective decisions of those individuals involved in the evaluation process. Agencies have used adjectives, narratives, symbols, color codes and numerical formulae in their evaluations. Normally, all evaluation systems have some form of narrative complement to the basic system which ties the process together. The use

of adjectives such as, "outstanding, excellent, good, fair, poor" and the use of color codes usually involves the placement of proposals and their specific aspects in certain ranges, which are represented by each adjective or color. This presumably allows more trade-off flexibility within those given ranges than would precise numerical scores.

a. Adjectival/Narrative

Numerical formulae are firmly embedded agency evaluation techniques, even though they are not required.[109] Yet, subjective rating systems have been the subject of far less protests. Perhaps this fact should provide at least food for thought amongst the agencies. In one of the few protests concerning a purely subjective system, NASA's use of an adjectival rating system was challenged.[110] Quite simply, the Comptroller General stated that his Office had no objection to the use of such a system, as long as it met the usual test of rationality. The protestor had argued the adjectival system masked the decision-making process, and, as such, offerors were not provided the rationale employed in making the decision. In another demonstration of discretionary latitude, the Comptroller General sanctioned a procuring agency's abandonment of a point-scoring scheme and substitution of a simple ranking system.[111] The proposals were point-scored initially, then each was ranked accordingly. All were discussed by the evaluation panel. The

protestor claimed that such a system magnified small differences in scores (e.g., the first, second and third ranked proposals scored 95, 94 and 93, respectively) and distorted the fact that some were essentially equal. Reiterating his usual stand that point scores are only useful guides, the Comptroller General said it was not unreasonable to expect that in a given case ranking may be a more direct and meaningful method if it allows procurement officials to gain a clearer understanding of the merits of competing proposals.

The regulations surveyed mentioned adjectival/narrative techniques with varying degrees of specificity. Of those regulations, the Air Force provides the most detailed material. AFR 70-15 cites two common methods for use in scoring below the Item level. They are the "numerical" method and the "narrative" method.[112] As the name suggests, the numerical method involves the assignment of a pre-established, prorated numerical scale designated to the specific Factors. Caution is suggested in the use of numerical scores, and cost/price is never to be numerically scored.[113] The regulation points out that the narrative method has been found to be a better approach at this level of evaluation.[114] In that regard, a symbol or color code may be used as an aid in determining how well the proposal met the standard for each Factor. For example, "+", " ", and "-" signs can be used to show that an offer has exceeded, met or failed to meet minimum requirements.[115] When a color code scheme is

used, the following spectrum must be utilized:

Exceptional, or exceeds standards - blue

Meets standards - green

Marginal, or fails to meet standards - yellow

Unacceptable - red[116]

When the Factors have been evaluated, the Item designator is determined from the following scale:

10	- Exceptional	Blue
9		
	- Exceeds Standards	
8		
7		
6	- Meets Standards	Green
5		
4		
3		
	- Fails to Meet Standards	Yellow
2		
1		
0	- Unacceptable	Red[117]

Specific guidance in the application of this scale is provided. For example, if the majority of the Factors meet standards, the requirement is not overly difficult, and the deficient factors are minor in nature, the Item should be scored "5".[118] Scores of "6" or "7" should normally be assigned to "relatively difficult" requirements where the majority of the Factors are acceptable, with no major deficiencies or risks existing therein, and the collectve approach yields a qualitative benefit to the Government.[119] However, where most of the major Factors are acceptable, but one or more are deficient and involve some minor risk, the

score "for the time" should be "4".[120] A "3, 2 or 1" is assigned where a majority of the Factors are deficient and correction involves problems or has a "domino effect" on other features.[121] The latter scores are also assigned to those approaches which contain high risks,[122] without means for correction if they fail. When a "major reorientation" of the proposal is necessary the Item is scored "0".[123] The highest numbers, "8, 9 and 10", are assigned to difficult requirements which are met with approaches that, with little risk, will yield results which qualitatively exceed such requirements.[124] Further, with regard to scores above "5", the regulation provides that such scores must not be assigned "simply because a proposal offers to exceed a requirement in some quantitative way."[125] That is, the offer may not necessarily be an advantage if it will not add substantially to the contemplated mission. Obviously, the assignment of a score above "5" should reflect some qualitative achievement.

b. Numerical Formulae

With regard to numerical systems, the Comptroller General has recognized their relative usefulness, stating that such ratings are useful guides in the evaluation process, but are not conclusive as to the actual adequacy of individual proposals.[126] They are used in an "attempt to quantify what is essentially a subjective judgment,[127] and "only reflect the disparate judgments of the evaluators and thus a

difference in scores may not reflect an actual difference in merit."[128] Numerical point ratings are sometimes used to score only initial offers, while best and final offers are subjectively analyzed,[129] or both initial and best and final offers may be numerically scored.[130] The scores assigned by evaluators are most often utilized in proposal evaluation, but in certain instances such scoring is "normalized", so that the highest rated proposal is equated to a maximum score.[131] Again, agency discretion predominates, as systems can be broad or very detailed.

All of the examined regulations mentioned numerical scoring, again with differing levels of detail. DOE simply notes that two principal techniques of rating proposals are numerical and adjectival, each having the same meaning as discussed in regard to the military systems.[132] Technical evaluation criteria are point scored and assigned numerical weights, while business/management criteria are usually rated by the adjectival method.[133] Cost is not assigned a numerical weight, or an adjectival rating, but is "used in the ultimate decision by the Source Selection Official to judge the value of the work to be done and the quality of the product or service to be furnished, and not as an addition to the cumulative score of the other analysis."[134]

A DOE point scoring system was challenged in a 1980 protest because it allegedly tended to enlarge any difference in technical merit and distort the relative importance of that difference.[135] The system used a scale of "10-8-5-2-0". The

Comptroller General stated that while a more refined method (e.g., "1-3-4-6-7-9") may have reduced any unintended distortions, it was ultimately for the source selection official to determine any significance in such scores, and it could not be said that the decision to award was not rationally founded. Thus, once again discretion prevailed.

NASA uses an undefined numerical scoring system for Mission Suitability as noted, with two added cautions:

> (1) It is only as good as the judgment made in selecting criteria and weights.
>
> (2) If care is not exercised to limit reasonably the number of subdivisions to be rated, the scoring system will introduce an "averaging out" effect that inhibits selection based on the really significant discriminators among the offerors.[136]

Predetermined weights are assigned, following evaluation, normally utilizing 1000 points as a perfect score.[137] Specific weightings are not divulged to evaluators below the level of the SEB itself, i.e., to the committee level.[138]

Perhaps it should be noted here that when numerical scoring is used, it is necessary to weigh the respective criteria in order to reflect their appropriate relative importance. A simple method is weight assignment by percentage distribution.[139] Another common method of weighting can be found in AFR 70-15, which provides for the use of weights by the SSAC when numerical scoring is utilized.[140] They are consistent with the requisite

solicitation disclosures and are established prior to the receipt of proposals. Weights in the Air Force cannot be divulged to the SSEB, nor, in accordance with DAR, to potential offerors.[141] Under the regulation, weighting may be accomplished by assigning each scorable Item of the evaluation criteria a share of 1000 points so that the end result represents the relative importance accorded each Item in the evaluation process. In order to do this, the numerical score assigned by the SSEB (raw score) is multiplied by the weighting factor developed by the SSAC and the result is divided by 10, the maximum raw score achievable. The formula appears as follows:

$$\frac{\text{(Raw score x Weighted factor = Weighted score)}}{10}$$ [142]

Before leaving the Air Force at this point, it might be mentioned that AFR 70-15 is presently undergoing revision. No estimate on a publication date for the new regulation is possible. However, while no basic changes in policy or procedures are contemplated, it is likely the Air Force will encourage the use of color coding techniques rather than numerical scoring, at least in major systems acquisitions.[143] Seemingly, the feeling is that the use of color coding provides a greater margin for discretion and avoids the inelastic connotations of numerical scores. Thus, subjective evaluations of strengths, weaknesses and risks of proposals falling within a particular color code may presumably be accomplished with more flexibility.

C. Combined Methods

In many major systems acquisitions, adjectival/narrative methods of evaluation are frequently used in conjunction with numeric systems. The agency regulations specifically provide for such combinations. Indeed the Air Force color code cited above incorporates numerical values.

In the Army, DARCOM P 715-3 states that the methods used for evaluating proposals should focus on "realizing the highest attainable measure of objectivity."[144] The "core" of the evaluation process, states the Army, is scoring.[145] Scoring may be accomplished by subordinate commands via several methods, no particular method being preferred. The "numeric method" is cited as the most frequently used, scores in such method being normally based on a preestablished scale from zero to ten.[146] Each numerical score must be accompanied by a supporting narrative signed by the evaluator which discusses strong and weak points.[147] Adjectival scoring is noted as often being employed in connection with numerical ratings.[148] A typical Army numerical-adjectival combined matrix is shown below:

SCORE	EVALUATION
10	Excellent -- (innovative, comprehensive and complete in all details, meets all requirements and objectives without gold plating).

9 Very Good -- (substantial response in clearly definable detail, meets all critical requirements).

7 Average -- (generally meets minimum requirements).

6 Poor -- (lack of essential information to substantiate data presented).

5 Unsatisfactory -- (lack of understanding of requirements or omissions in major areas).

0 No data.[149]

In the Navy, it is necessary to refer to one of NAVMAT's subordinate commands in order to find guidance on techniques. NAVELEX Instruction 4200.12C requires that "a numerical scoring system will be employed which will translate the word descriptions into quantitative terms."[150] Briefly, the substance of that system is as follows:

(1) "Score 81 to 100% - Excellent." Offeror displays highest levels of innovation, technical competence and managerial ability, and fully meets expectations.

(2) "Score 61 to 80% - Good." Offeror demonstrates acute awareness of requirements, and his technical and planning efforts show strong promise.

(3) "Score 41 to 60% - Fair." Offeror presents technically correct, orderly plan to meet requirements, but demonstrates no exceptional features.

(4) "Score 21 to 40% - *Poor.*" *Offeror* indicates less than full understanding of requirements, and fails to demonstrate a reasonable probability of performing the desired tasks, or his approach is risky, even though his analysis is technically correct.
(5) "Score 0 to 20% - Unacceptable." Does not meet the requirements stated in the RFP.
(Note: An unacceptable rating in one or more "critical" areas may make the entire proposal unacceptable, even though the total score may be considerably higher than 20%.)[151]

3. Cost/Price Evaluations - Special Problems

a. General Considerations

Like other evaluation criteria, agencies must determine what role cost/price will play in a particular procurement, as well as how that role will be evaluated. A third consideration is how much of the above two determinations should be disclosed to industry. We have already discussed cost/price as an evaluation criterion. Disclosure considerations will be discussed in the following chapter. This section will examine various cost/price evaluation methods and their inherent difficulties.

The evaluation of cost/price presents special problems, and agencies have used a variety of methods to combat them. As noted, some procuring agencies consider costs or prices without the use of numerical scores. When so considered, costs may be compared to other factors, even though the latter are numerically point-scored.[152] Cost/price may also be evaluated numerically and the resultant score totalled with other evaluation factor scores.[153] When the latter method is used, costs are usually scored by awarding the maximum amount of allowable points to the lowest priced technically acceptable offer, with proportionately lesser points given to higher priced offers.[154] For example, one agency weighted technical proposals at 80 percent, with a corresponding maximum point value of 80 points.[155] Price proposals were weighted at 20 percent, with a 20 point maximum. Price proposal scores were computed by assigning 20 points to the lowest proposal, dividing each of the other prices into the lowest price, and then multiplying the result by 20. In that regard, it might be worthwhile to note here that when a solicitation sets forth a precise numerical evaluation formula and provides award will be made on the basis of the total point score, then the highest scored acceptable proposal should be selected, i.e., trade-offs are limited.[156]

The Comptroller General has even sanctioned the practice of quantifying technical point scores in terms of relative dollar advantage by computing cost/quality

ratios.[157] The Army specifically provides for the use of such ratios, classifying them as "special factors" to be considered in appropriate procurements.[158] This ratio is established by dividing the cost of the proposal by the total unweighted raw score developed for technical considerations. The Army notes that the ratio by itself is not justification for selection, but is only an additional factor to be considered. However, they believe that the offerors' knowledge that this relationship will be given consideration will force them to trade off between cost and technical factors "in order to prepare the best possible proposal at a fair and reasonable price."[159] While the Navy's regulations that were surveyed do not specifically mention "$/q.p." ratios, they have been criticized for utilizing them as the primary reason for awarding "turnkey" housing contracts on initial proposals.[160] "Turnkey" procurements for family housing usually allow widely varied approaches and designs, within the constraints of performance specifications. As such the Comptroller General has stated that:

> Because of this wide variance of approaches, although an offeror has received the lowest $/q.p. ratio, that does not mean it is necessarily offering such a "fair and resonable" price that oral or written discussions would not be required, notwithstanding the existence of several competitive offerors, since a true basis for comparison of the proposals to insure a "fair and reasonable" price was received may be lacking.[161]

In any case, the evaluation of cost or price via

numerical formulae can be precarious. Indeed, some procurement regulations emphasize that such methods are only to be considered rough yardsticks. The Comptroller General has also found it necessary on many occasions to criticize agency numerical scoring methods of cost or price. Thus, it is inappropriate to point-score proposals on price when those proposals have no reasonable chance of being selected for award, particularly when those proposals are also significantly lower priced than those in the competitive range.[162] In a 1980 protest, the Comptroller General stated:

> We do not understand what purpose is served by point-scoring proposals on price when those proposals have no reasonable chance of otherwise being accepted, and, as indicated in Francis & Jackson, when such proposals are also significantly lower priced than those which are in the range of acceptability, their inclusion in the price scoring could distort the evaluation results.[163]

Nevertheless, the test of rationality prevailed once again, with the Comptroller General finding that the selection was not irrational or otherwise illegal. However, he cautioned source selection officials to be aware of the possible misleading results of such evaluation techniques and to make certain that awards are not made "automatically on the basis of the results of point scoring."[164]

Similarly, the inclusion of a very high price can result in an improper "bunching" of scores for other, more realistic prices. Specifically, "bunching" occurred where a

procuring agency assigned maximum points to any cost proposal falling within a range of $25,000.00 to $60,000.00.[165] The Comptroller General opined that such an evaluation could lead to distorted results where award might be made to an offeror at a much higher price simply because such offeror has a slight technical advantage. Further, such an evaluation has the effect of eliminating cost as an evaluation factor.

Likewise, a formula which assigns "essentially" equal scores to all proposals can have the same detrimental effects. Thus, cost scoring based upon the following formula proved unacceptable:[166]

$$\frac{\text{Average Cost of All Technically Acceptable Proposals}}{\text{Offeror's Proposed Cost}} \times 20 = \text{Cost Score}$$

Obviously, since no offeror could be assigned more than 20 points for cost, all cost proposals below the average cost received the maximum 20 points. Those which proposed more than the average cost received slightly lower scores. The Comptroller General found that the application of this formula resulted in the majority of initially acceptable offerors receiving the maximum number of points. Also, there was no meaningful difference between scores assigned offerors even though the proposed costs ranged from $10,810.00 (20 points) to $23,216.00 (18 points).

Another improper evaluation was found in a 1981 protest when prices proposed by 13 original offerors were included in a final cost evaluation of the four offerors within the competitive range.[167] This action resulted in cost receiving less than the announced 40% weight.

One simple lesson can be learned from the numerous cases on the numerical scoring of cost/price: agencies must be careful and ensure that any such scoring does not include the evaluation of offers which would cause improper distortions. Yet, in spite of what appears to be a clear lesson, protests and criticisms of agency methods continue. No doubt the frequent ultimate denial of such protests based upon grounds of rationality or lack of prejudice contributes to agency complacency.[168]

b. Cost/Price Analysis

The core of cost/price evaluation is an agency's analysis of the proposed cost/price in each case. The DAR, FPR and NASA PR all require that some form of either cost or price analysis be utilized in all negotiated procurements, the method and degree of analysis being dependent upon the particular nature of the procurement and the pricing situation involved.[169] Cost analysis must be performed whenever cost or pricing data is required to be submitted by offerors, while price analysis must be performed whenever

cost analysis is not, and it should be used to supplement cost analysis whenever appropriate.[170] Further, specific methods of performing price and cost analysis are provided by the procurement regulations.[171]

In addition to the DAR provisions, the Air Force emphasizes that cost/price evaluations should consist of an assurance of comparability, a verification of rates, a determination of cost/price realism, and a special assessment for any cost/price which appears to be unrealistic.[172] The principal aims of NASA cost analyses are validity of proposed costs, the probable cost to the Government of each proposal, the probable cost differences among the proposers and their causes, and the level of confidence in their cost analyses.[173]

Generally, an agency's judgment as to the methods necessary to perform an adequate analysis is entitled to great weight.[174] In the 1976 protest of Grey Advertising, Inc., the Comptroller General stated that he "will not second-guess a cost-realism determination unless it is not supported by a reasonable basis."[175] Even though the Navy conducted a somewhat less than "in-depth" cost analysis, their determination was nevertheless reasonable. There, no independent verification or otherwise in-depth analysis of proposed costs was undertaken in an indefinite quantity contract. The Comptroller General found that where an agency can't precisely identify future requirements and

must request estimated costs on the basis of a hypothetical plan, such estimated costs can provide an adequate basis for cost comparison between competing proposals.

Although some form of analysis is required in all negotiated contracts, most of the controversy surrounding realistic cost analysis is found in the area of cost reimbursement contracts. As to the role of cost in such contracts, DAR 3-803(c) states:

> In selecting the contractor for a cost-reimbursement type contract, estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (i) the lowest proposed cost, (ii) the lowest proposed fee, or (iii) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and appropriate to the work to be performed (see 3-808). Beyond this, however, the primary consideration in determining to whom the award shall be made is: which offeror can perform the contract in a manner most advantageous to the Government.

FPR 1-3.8051(d) and NASA PR 3.80-2 contain similar provisions.

While the methods employed in obtaining a proper cost analysis may be discretionary, at a minimum some form of independent determination of cost realism is required in cost reimbursement contracts.[176] The Comptroller General has stated:

> The award of cost reimbursement contracts requires the exercise of informed judgments as to whether proposed costs are realistic, and it is improper to award such a contract on the basis that such costs are reasonable because they are low per se on a comparative basis, if the Government fails to adequately measure the realism of such low costs.[177]

Thus, it is improper to take proposed costs at face value simply because an awarder has a "past history of frugality."[178] Likewise, inadequate analyses include a simple comparison of proposed costs,[179] ignoring unrealistic cost proposals by assigning equal scores to all cost proposals,[180] and simply assigning the highest point score to the lowest proposed cost.[181]

What these requirements mean is that when a cost reimbursement contract is involved, evaluated costs rather than proposed costs provide a more sound basis for determining the proposal most advantageous to the Government, since the Government is required, within certain limits, to pay a contractor's actual, allowable and allocable costs in such contracts.[182] While the Comptroller General has agreed with regulatory requirements for independent Government cost estimates, he has also

cautioned against undue reliance on them, in view of the inherent performance uncertainties in cost reimbursement contracts.[183]

C. Normalization Techniques

The determination of cost realism in proposals is the substance of cost analysis. In creating systems designed to determine such realism, agencies sometimes use a technique commonly called "normalization". Like other methods of analysis, normalization should also be used only when appropriate to the particular procurement.

Normalization has been described by the Comptroller General in the 1975 protest of Dynalectron Corporation as:

> Normalization is a technique sometimes used within the cost adjustment process in an attempt to arrive at a greater degree of cost realism. It involves the measurement of at least two offerors against the same cost standard of baseline in circumstances where there is no logical basis for differences in approach, or in situations where insufficient information is provided with the proposals, leading to the establishment of common "should have bid" estimates by the agency. See Matter of Lockheed Propulsion Company, B-173677, June 24, 1974, 53 Comp. Gen.[184]

As such, where the requirements of the contract call for flexibility or individualized approaches, normalization is

improper. Examples of good and bad normalizations were present in Dynalectron Corporation. An appropriate normalization concerned the normalized costs proposed by offerors for paymnent of a state tax, since such tax was applicable to all offerors, whereas normalization of labor costs involved in individualized approaches for certain services were inappropriate. In that regard, the Comptroller General stated:

> The proper goal in both instructing offerors as to proposal preparation and in conducting the probable cost evaluation itself is to segregate cost factors which are "company unique"--dependent on variables resulting from dissimilar company policies--from those which are generally applicable to all offerors and therefore subject to normalization.[185]

Thus, if the subject of the normalization technique fits the commonality requirement, the Comptroller General won't object unless the analysis lacks a reasonable basis.[186] However, unreasonableness can be found in neglecting to normalize when appropriate. In one protest it was found unreasonable for an agency to fail to normalize cost differences when a common cost per pound for a certain item was clearly apparent.[187] In another case, failure to normalize proposed airline fare costs was improper.[188]

The term "normalized" is also applied to other techniques whereby cost is converted into certain ratios involving technical considerations, as was discussed

previously. Again, when this is done, care should be taken to assure that any such analysis does not distort reality. A classic example of such a situation can be found in the 1975 protest of Bell Aerospace Company, where certain cost/quality ratios were developed which in effect made the cumulative dollar value of a proposal dependent upon the number of individual evaluation factors used in the normalization process.[189] In other words, the higher the number of evaluation factors used, the higher the computed cumulative dollar value.

The agency regulations examined were essentially silent on normalization procedures. In any case, whether normalization is a proper method of analysis depends upon the facts of the particular acquisition. It is not appropriate in all cases, yet in some it should be done. Therefore, in creating a normalization technique, agencies should be intimately familiar with Comptroller General decisions in this area.

CHAPTER III

DISCLOSURE OF THE SYSTEM

A. Background

Once the contracting agency's needs are translated into evaluation factors, it becomes necessary to convey them in a fair and comprehensible manner to industry. The Comptroller General has played the pivotal role in the formulation of the basic structure of what is considered a fair and equitable system of disclosure, slowly refining the system over the past two decades. That structure is built around the concept of disclosure of the evaluation factors and their relative weights, or relative importance.

In the early 1960's, the DAR, FPR and no doubt most other agency regulations contained no reference to the need for disclosure of evaluation factors and their relative weights. After making several suggestions via bid protest decisions, the Comptroller General criticized the Air Force in 1965 for failure to disclose pertinent evaluation criteria and their relative importance by saying:

> With respect to the failure of the Air Force to specifically advise prospective offerors of all evaluation factors and to indicate relative importance attached to each, it is our opinion that sound procurement policy dictates this should be done. However, since we are aware of no such formal requirement we are taking occasion to recommend to the Secretary of the Air Force that procedures in

> this area be reviewed with a view to issuance of appropriate regulations on the subject.[190]

In spite of this clear indication that the Air Force had violated "sound procurement policy", little regulatory guidance was promulgated. In 1968, another Air Force procurement was severely criticized, and the Comptroller General "strongly" urged that corrective measures be taken.[191] A year later, the Comptroller General laid it on the line in the often-cited protest of Berkeley Scientific Laboratories, Inc.[192] Once again the Air Force provided the faulty solicitation, which, although a precise formula during evaluation was to be used, merely stated, "Greater emphasis shall be placed on the following criteria in the order listed."[193] Several disclosure requirements were set forth in that opinion, as can be seen by the following language:

> "While we have never held, and do not now intend to do so, that any mathematical formula is required to be used in the evaluation process, we believe that when it is intended that numerical ratings will be employed, offerors should be informed of at least the major factors to be considered and the broad scheme of scoring to be employed. Whether or not numerical ratings are to be used, we believe that notice should be given as to any minimum standards which will be required as to any particular element of evaluation, as well as reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other.[194]

Since Berkeley, the Comptroller General has continued to reaffirm the opinions stated therein and to refine them.

Later, he stated the disclosure requirements of Berkeley applied with equal force to civilian agencies.[195] Nevertheless, an offeror has been found not to be prejudiced when he correctly assumed the relative importance of the evaluation criteria, even though the RFP didn't meet the requisite disclosure requirements of the Comptroller General and the DAR.[196]

Regarding disclosure requirements, DAR 3-501(b)(3)(M)(i) states:

> [W]hen an award is to be based upon technical and other factors, in addition to price or cost, the solicitation shall clearly inform offerors of (a) the significant evaluation factors, and (b) the relative order of importance the Government attaches to price and all such other factors. Numerical weights, which may be employed in the evaluation of proposals, shall not be disclosed in solicitations;...

Similar requirements are contained in DODD 4105.62,[197] AFR 70-15,[198] DARCOM P 715-3,[199] and NAVMAT Instruction 4200.49.[200] DARCOM P 715-3 provides some insight, at least with regard to Army opinion, as to why numerical weights are not to be disclosed, when it says that such disclosure could create "an inflexible situation which might rigidify the contractor's input to the detriment of its overall quality, and deny the SSA the measure of discretion that he needs to protect the Government's interest."[201]

FPR 1-3.802(c)(2) has provisions comparable to the DAR regarding disclosure of evaluation criteria and their relative importance, except that the FPR does allow

disclosure in the solicitation of numerical weights which may be used in the evaluation of proposals. However, while HHS provides that solicitations "need not" state such numerical weights,[202] DOE solicitations are nevertheless prohibited from disclosure of actual numerical weights assigned to evaluation criteria.[203] NASA has disclosure requirements almost identical to those of the DAR cited above, including the prohibition against disclosure of numerical weights.[204]

B. Methods of Disclosure

The regulations provide scant guidance as to specific methods of disclosure of evaluation criteria. Obviously, the method chosen to inform industry of the relative importance of criteria must be flexible and vary with the needs of the particular procurement. NASA requires that evaluation criteria will be narratively described in order of relative importance.[205] DOE attempts to provide relatively specific guidance by noting that solicitations should:

> [D]escribe the technical, business and management evaluation criteria and clearly indicate their relative importance. It is not sufficient to merely rank the criteria in terms of "primary', 'secondary', and next in importance." For example, if the first of the five criteria represents 72% of the total score and six times the weight of the second most important criterion, the predominant value of that criterion should be indicated in the RFP

> in some narrative manner. The criteria should also be listed in descending order of importance. The major evaluation criteria may be divided into sub-criteria which should be described in terms of their relative importance and also be listed in order of relative importance. The actual numerical weights assigned to the evaluation criteria will not be included in the RFP.[206]

In any case, no particular manner of disclosure is required, and any of the following possible methods may be adequate as long as the objective of a fair and intelligent competition is maintained.

1. Absence of Any Indication

As long as all criteria are approximately of equal importance, no indication of relativity need be made. In that same regard, if the solicitation contains no indication of relative importance, offerors may assume that all criteria are of equal importance.[207] The Comptroller General recently had an opportunity to reaffirm his general rule in a 1981 HEW case, wherein he held that when an RFP indicates only technical and cost factors will be evaluated for award, without an indication of relative importance, both factors are to be accorded substantially equal weight in the evaluation.[208] The RFP stated:

> EVALUATION CRITERIA
> All proposals will be evaluated in accordance with the following evaluation factors and the respective point values

> assigned to each are indicated. Any award which may be made will be made to that responsible offeror who can best perform the work in a manner most advantageous to the Government, cost and all of the below factors considered. (Emphasis added.)[209]

HEW conceded that the relative importance of cost and technical factors was not specified, and stated they would take corrective actions to prevent future reoccurrences. Nevertheless, the protest failed on this point since HEW used the general rule in their own defense, i.e., they evaluated technical and cost factors as equal, whereas the offeror didn't consider them as equal in his offer.

2. Descending Order of Importance

The regulations discussed above speak of disclosure in terms of relative order of importance. Generally, evaluation factors may be listed in descending order of importance without otherwise describing their significance. However, agencies must be careful that no one factor is of predominant value. If one is, such importance should be disclosed to offerors.[210]

Exactly what is "predominant" is not an easy question to answer. Some comprehension of the problem may be drawn from two cases. In the first, BDM Services Company, the U.S. Marine Corps issued an RFP which listed five technical evaluation factors, set forth in order of

their priority, with the first being the most important.[211] The established numerical weights were 72, 12, 9, 4 and 3 respectively. BDM protested on several grounds, one of which stated that they were misled by the alleged inadequate language in the RFP which simply stated, "the first (factor) being the most important."[212] The protest was found to be untimely, but the Comptroller General commented on the Marine Corps' position that the disclosure followed the rules of DAR 3-501(D)(i), i.e., that they were prohibited from disclosure of numerical weights. He stated he has consistently held that while offerors should be informed of the relative weight or importance attached to evaluation criteria, disclosure of precise numerical weights is not required. Thus, he does not object to the DAR prohibition. However, he went on to say:

> Nevertheless, it has always been our position that offerors should be informed of the "broad scheme of scoring to be employed and given reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other." (Emphasis supplied.) * * * We have recognized that an appropriate method of disclosing the relative weights of the evaluation criteria is to list the evaluation factors in descending order of importance to priority. * * * However, under some circumstances listing the evaluation factors in relative order of importance will not suffice to even inform the offerors of the broad basis on which their proposals are to evaluated. * * *
>
> Here the first of the five evaluation factors listed in relative order of importance constituted 72 percent of the total technical evaluation score and was 6

> times the weight of the second factor and 24 times the weight of the fifth factor. We believe that in consonance with ASPR 3-501(D)(i), the predominant value accorded the first factor should have been disclosed to the offerors. Moreover, we believe the general relationship of the remaining factors to each other could have been described in narrative without violating the prohibition against disclosure of precise numerical weights in ASPR 3-501(D)(i). As a matter of sound procurement policy, the fullest possible disclosure of all of the evaluation factors and their relative importance is to be preferred to reliance on the reasonableness of the offerors' judgment as to the relative significance of the various evaluation factors.[213]

In a later case, Bayshore Systems Corporation, a Navy RFP described technical considerations as the most important evaluation factor, and price as second most important.[214] The nondisclosed numerical evaluation formula weighted technical factors three times as heavily as price. However, this inconsistency was found not to be objectionable. The Comptroller General stated that although the RFP could have been more definite, he could not say the three to one relationship was so out of line with the RFP statement that use of the formula was objectionable. The RFP clearly pointed out that technical considerations were most important.

The adventuresome individual might generalize from the preceding two cases that ratios of six to one or higher must normally be disclosed, whereas ratios of three to one or less do not. Anything in between is open to conjecture.

However, it would appear that this generalization is clearly dependent upon any accompanying language in the RFP relating to relative importance, and therefore perhaps any such generalization is of little value except in the case where no narrative is supplied whatsoever.

3. Point Scores or Percentages

As we have seen, the numerical weights which will be utilized in the evaluation can be used to indicate relative importance, except for NASA and DOD solicitations. Also, simple percentages may indicate such importance.[215] In one interesting case the contracting agency listed the evaluation factors in descending order of importance.[216] Each factor was ascribed a percentage weight in the RFP, with a notation that the maximum weight would not exceed a certain percentage. In its evaluation, the evaluation panel varied the percentage of certain factors but all factors remained in the same relative order of importance. The Comptroller General denied a protest against such alteration, stating that it did not radically depart from the RFP evaluation scheme.

4. Adjective or Narrative

Relative importance may also be indicated by

assigning adjectives, or by providing a narrative description of each factor's importance.[217] This method can be and often is used in conjunction with listing on any other type of disclosure, as we have already seen.

C. The Relative Importance of Cost/Price

Offerors are entitled to know the relative importance of cost/price. The Comptroller General's often quoted rule is that "each offeror has a right to know whether the procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality."[218] This rule is likewise applicable to cost reimbursement contracts.[219]

The agency regulations examined for this review all recognized the requirement for and value of clearly defined and disclosed cost/technical trade-offs.[220] In particular, DODD 4105.62 requires that all new major systems include design to cost goals consistent with the total cost approach (i.e., trade-offs among development, production, operational and support costs), and that such goals be clearly defined in the solicitation.[221] As such, trade-offs are encouraged across the spectrum of design, development, production, operations, and support, in major systems acquisitions.[222] While most of the regulations simply specify that such trade-offs will be disclosed, AFSC Supp 1 highlights the fact that a "boilerplate" approach to disclosure should be

guarded against, and provides a suggested trade-off provision for use as appropriate:

> The system performance requirements contained in this Request for Proposal are structured, to the extent practicable, so that each offeror will be free to propose his own technical approach, main design feature, subsystems, and alternatives to schedule, cost, and capability goals. The basic performance requirements set forth therein are stated as either firm requirements, as goals, or as acceptable parameters. The goals and parameter factors may be traded off to structure what you consider to be the optimum balance. To achieve this optimum balance, tradeoffs of these factors may be made on a single-element basis or in combinations within the established parameters or bands.
>
> The stated requirements, both firm and tradeable factors, are perceived to be achievable and the appropriate mixture for achieving a balanced application of all factors which will best service the Government's needs. If it is your judgment that we have not arrived at the best mixture, proposed alternatives will be considered and, if accepted, the solicitation will be revised accordingly.[223]

Obviously, the manner and intensity of dislcosing the relative importance of cost varies with the type of procurement. Particular care must be taken in disclosing the relative importance of cost/price, as failure to be specific can cause problems.

In a recent Army case dealing with a fixed-price contract, the RFP listed technical evaluation factors in descending order of importance, and then merely stated that price realism would be considered.[224] Following evaluation, the Army proposed award to the lowest priced

technically acceptable offeror, i.e., they didn't consider technical superiority advantageous once a minimum level of acceptability was reached. The protestor submitted a technically outstanding proposal on the assumption technical superiority would be considered at least as much as any price advantaged proposal. The Army attempted to use the "no indication-equal weight" assumption, to no avail. The Comptroller General noted the Army in fact did not intend to accord equal weight to price and technical factors, but instead wanted to award on the basis of the lowest priced technically acceptable offer. Further, he said he has frequently pointed out that a reference to "price and other factors" without more does not sufficiently inform offerors of the relative importance of price, and stated:

> This language merely establishes that when making an award in a negotiated procurement, a Source Selection official cannot totally disregard price, 50 Comp. Gen. 110 (1970), and that price alone is not determinative since the reference to other factors includes consideration of the technical acceptability of proposals.[225]

Contracting agencies seem to fare better with faulty trade-off disclosures in cost reimbursement contracts. The Comptroller General distinguished the above Army case from another case involving a cost reimbursement contract.[226] In that case, even though the solicitation didn't explicitly set forth the relative importance of cost to technical factors, it was found to fairly notify offerors of the cost-technical trade-off, and that cost was important. The

RFP stated proposed costs would be considered separately, it indicated technical advantages or disadvantages could offset cost differentials, and it said award would be made to that offeror whose proposal was most advantageous to the Government, "price and other factors considered."[227] While finding the RFP could have been more explicit, the Comptroller General nevertheless stated he had no grounds to conclude that no reasonable basis for award existed where there was information indicating both cost and technical factors would be important, and, that therefore they were to be assumed of equal importance.

In another case, the mere statement that "cost and other factors" would be considered in award was declared insufficient.[228] However, a cost reimbursement contract was involved. In denying the protest, the Comptroller General indicated the FPR provides that cost estimates are important in determining an offeror's understanding of the project. Since the protestor's cost estimate disclosed a lack of comprehension of the basic problem, he could not reasonably blame the RFP for lack of guidance in his own shortcomings.

Finally, in a 1980 protest, the Comptroller General found an RFP to be inarticulately drafted, but adequate nevertheless.[229] When read in context of the entire RFP, it was apparent cost was secondary to technical quality. In an example of poor draftsmanship, the RFP read:

> NOTE: Cost is a factor. However, it is an unweighted factor. The closer the technical scores become as part of the evaluation process, the more significant costs will become.[230]

Later, in an attempt to "clarify" the importance of cost, the RFP was amended as follows:

> The degree of the importance of cost as an evaluation factor will increase with the degree of the quality of the proposals in relation to the other factors on which selection is to be based.[231]

In any case, the basic rule in this area is clear: agencies must clearly and specifically disclose the relative importance of cost/price in any procurement. This is a rule founded in logic, since it is obviously to the Government's advantage to disclose those areas where acceptable savings may be made. The most problems appear to occur in the drafting of those trade-offs in the RFP. Thus, agencies must strive to be as precise and as specific as possible in their disclosures.

D. Disclosure of Subcriteria

The agency regulations surveyed offer relatively little guidance regarding disclosure of subcriteria. Those regulations that do comment on subcriteria disclosure simply reiterate the basic rules discussed below. However, NASA curiously provides that subcriteria will not be included in

the solicitation.[232] As will be seen, the extent of this NASA provision is limited by Comptroller General rulings. Generally, subcriteria may be listed in solicitation, but there is no requirement to do so if the subcriteria are logically and reasonably related to the stated evaluation factors.[233] An apparent exception to that general rule was made in the 1976 protest of Dikewood Services Company, where the Comptroller General stated:

> Each subcriteria need not be disclosed so long as offerors are advised of the basic criteria, and any subcriteria used by the agency in the actual evaluation are merely definitive of the basic criteria. However, where a relatively sketchy evaluation plan is stated in the RFP, and the agency possesses an extremely detailed evaluation scheme with numerous, unannounced, definitive subcriteria, the withholding of those known subcriteria does not promote the basic procurement objective of providing offerors with sufficient information to prepare an intelligent response to the Government's requirements.[234]

Thus, although definitive subfactors need not normally be disclosed, it appears that when an agency uses an extremely detailed evaluation scheme with numerous, undisclosed subfactors, and where the RFP is sketchy, those subfactors should be revealed to assure intelligent offers.

In those cases where subfactors should be disclosed, the question arises as to whether or not their relative weights need be disclosed also. The Comptroller General addressed this question in the RCA Service Company protest discussed at length in the beginning of Chapter II. In that case, the RFP listed six subcriteria under the first main criterion,

but it contained no relative weights for them. As noted,the sixth subfactor became critical in the award. Finding an impropriety therein, the Comptroller General ruled that when the solicitation contains no information on the relative weights of subfactors, offerors are entitled to consider them to be of equal importance. Thus, offerors must be told of unequally weighted subcriteria.

The RCA ruling was modified somewhat in a 1979 protest by AEL Service Corporation, et al.[235] That protest involved the Army's failure to disclose all of the subfactors used in their evaluation, and their failure to disclose the relative weights of all disclosed subfactors. As to the failure to disclose all of the subcriteria, the Comptroller General applied the "logically and reasonably related" rule to find that their disclosure was not required. As to the relative weights of the disclosed subfactors, he had this to say:

> In regard to AEL's contention concerning deception as to the relative weights of the evaluation criteria, it has been the consistent position of our Office that offerors should be placed in a position to make accurate and realistic proposals by informing them of relative importance in the solicitation. * * *
> Conceding the efficacy of this principle, we believe that its effect should be limited to the principal evaluation factors. * * * That is to say, not all subcriteria of the principal factors need to be treated in the same manner as the principal criteria. * * * Being definitive subcriteria, we find no harm in the failure to disclose the relative weights of these types of subcriteria, as they are all elements which basically

> comprise the main criteria, but in a narrative fashion. It is our opinion that an offeror could not realistically assume that subcriteria of such a definitive nature, unless stated otherwise, would be of equal importance in relation to each other. * * *
>
> We do however, want to clarify and distinguish this position from instances involving subcriteria which are essential characteristics or measurements of performance of the end item being procured. We believe the relative importance of these subcriteria would have to be disclosed in order to allow offerors to properly formulate their proposals.
>
> Our holding in 51 Comp. Gen. 272, 281, is modified to the extent inconsistent with the foregoing.[236]

Thus, the curious result of this decision appears to be that if the disclosed subcriteria contain no relative weights, they may be assumed equal only when they are "essential", since if they are "definitive", they could be of unequal weight.

E. Disclosure of Evaluation Methods

With the exception of NASA and the Army, none of the regulations reviewed mentioned disclosure of the actual method of evaluation to be employed. NASA requires the solicitation to contain a clear explanation of the method of evaluation to be used, "so that prospective offerors may understand the SEB's use and treatment of the four categories of factors, and so that they will know that the SSO, not the SEB, will make the judgments required, all

factors considered, in selecting the winning offeror."[237] The Army similarly requires a disclosure of the general method of scoring to be employed, the rationale for such requirement being stated as follows:

> [O]fferors sometimes misunderstand how their proposals are evaluated, particularly when both numerical and qualitative scoring techniques are mixed in an evaluation. Such misunderstandings can be avoided with a brief description of the scoring plan to be employed. Although there is no preference relative to the various methods of factor scoring, a broad scheme of scoring is appropriate for disclosure to the offerors.[238]

In any case, there is no requirement to disclose the method of evaluation to be utilized. In a 1981 protest, the protestor objected to the evaluation method used by the Navy, arguing in part that since they were not told of the manner in which the evaluation would be conducted, the Navy was not in compliance with the applicable procurement regulations and past Comptroller General decisions which required disclosure of evaluation factors.[239] Disagreeing, the Comptroller General stated:

> The decision of our Office cited by Ridgeway, 48 Comp. Gen. 464 (1969), and DAR §2-503.1, require that a procuring agency disclose the evaluation factors to be used and their relative weights, not the evaluation method. * * * We find the RFTP adequately advised offerors of the manner in which proposals were to be prepared and the manner in which the proposals were actually evaluated would have had no impact on a properly prepared proposal.[240]

CHAPTER IV

USE OF THE SYSTEM

A. Consistency

Chapter II began with the proposition that the one thread which binds the entire source selection process together was that of agency discretion. That discretion was present in the creation of a system, in its disclosure, and finally, in the actual use of the system in making the ultimate selection. In exercising that discretion in selection, agency procurement officials are subject only to the tests of "rationality and consistency with established evaluation factors."[241] The former test will be dealt with in the next section of this chapter. The latter test maintains that proposals should be evaluated on the basis of the criteria set forth in the solicitation. If there are material changes to the disclosed criteria, then the solicitation should be amended, and all offerors should be given the opportunity to revise their proposals.[242] The procurement regulations recognize these requirements. DAR 3-805.4 provides:

> [W]hen, either before or after receipt of proposals, changes occur in the Government's requirements or a decision is made to relax, increase or otherwise modify, the scope of the work or statement or requirements, such change or modification shall be made in writing as an amendment to the solicitation.

The FPR[243] and NASA PR[244] contain similar requirements, as do the particular agency regulations surveyed.[245] Clearly, the reason for these requirements lies in the statutory and regulatory objectives of promoting maximum practicable competition. These objectives can only be met if all offerors are in fact competing on an equal basis, such basis being composed of common evaluation criteria.

The Comptroller General has had frequent opportunity to examine protests involving the alleged use of undisclosed or changed evaluation criteria. Simply stated, agencies create their own problems by not applying the evaluation factors as disclosed. For example, an agency's evaluation was found improper where they ignored six out of twelve disclosed subfactors, the effect of which increased the relative importance of price from an intended 30% to an actual 50%.[246] As discussed previously, it was improper for an agency to use a formula in evaluating proposals which gave only negligible weight to cost, when the solicitation indicated cost would be given an evaluation weight of 20%.[247]

Criteria modifications and additions during evaluations provide fertile ground for protests. Where prospective contractors were informed in a solicitation that award would be based on a rental price per square foot (among other factors), an evaluation and award based on an undisclosed factor involving lowest overall life cycle cost was

faulty.[248] The Army had problems with life cycle costs when they evaluated them over a life period of 12 months, notwithstanding the fact that the solicitation said evaluation would encompass a 60 month period.[249] The Army failed to convince the Comptroller General that under any life period the awardee would have been low since the cost evaluators' scoring was subjective, and it had disparities. Therefore, it couldn't be accurately determined how the evaluators would have scored cost if they had used a 60 month period. HEW found similar criticism by requesting offers for performance of a contract over a 17 1/2 month period, yet awarding to a firm on a 27 months basis.[250]

The improper use of different criteria than that disclosed in the solicitation can clearly be recognized in one protest where the agency informed the prospective contractors that primary emphasis in a study covering several environmental media would be on drinking water, while in fact the intent of the agency was to place equal emphasis on each of several disclosed media.[251] The Comptroller General found material prejudice in the failure to clarify such known requirements by issuing a written amendment after receipt of initial proposals.

Other examples of inappropriate uses of undisclosed criteria include consideration of the actual operation of a system while the RFP indicated only the evaluation of a capacity for such system,[252] and award to an offeror whose offered price would become low price only upon the agency's

exercise of an option, when the solicitation didn't provide for the evaluation of options.[253] The latter award was declared to be arbitrary and capricious, and without a reasonable basis. Changes in delivery schedules may also require amended solicitations.[254] In perhaps the highest valued protest ever sustained by the Comptroller General (approximately $1 Billion), the Air Force's acceptance of an alternate delivery schedule that deviated from the solicitation was held an impermissible material change which required notice to all offerors and opportunity for revision of proposals.[255] The Comptroller General found that the awardee's proposed accelerated delivery schedule represented a relaxation of the stated RFP requirements, noting that the delivery of some of the components pursuant to the awardee's schedule could be made at a later date than required by the RFP. This defect was considered serious, and the Comptroller General recommended the award be set aside. However, that recommendation was rejected by a federal district court judge, who found that the decision to award had a rational basis, and that national security interests precluded disturbing the award.[256]

Procuring agencies seem to overcome allegations that they have used undisclosed criteria improperly if those undisclosed criteria bear some reasonable relationship to appropriate disclosed criteria. Perhaps this is simply a somewhat awkward analogy to the rule regarding the disclosure of subcriteria discussed previously. For

example, in a 1981 protest, the Army used an evaluation factor not in the RFP which assigned more weight to a proposal containing experts in both Marine Corps and Navy aspects of helicopter aviation, than to one with a single expert in both aspects.[257] The plan was held to be appropriate, since the importance and experience of such experts were "reasonably discernible" from the RFP. As such, "offerors were on notice and should have anticipated this subcriterion."[258] Likewise, DOE successfully avoided a protest against their use of a mock task in its evaluation process.[259] The RFP contained no criteria for evaluating the mock task, nor did it have any indicia of its significance. The task was not point scored nor adjectively rated, but did impact upon the SEB's "overall perception of each offer in light of the evaluation criteria."[260] In finding the protest without merit, the Comptroller General stated that the mock task constituted a requisite demonstration of timely ability to respond to certain assignments, and a demonstration of each project manager's ability to command required resources, both of which were disclosed in the RFP.

Two other examples of "reasonably discernible" criteria are where offerors were adequately informed that 700 points would be assigned to price and 500 points to technical operations when the RFP stated each would be "almost equal in weights",[261] and where the use of education, experience and salaries when evaluating an "understanding of personnel

requirements" criterion was declared sufficiently related to the solicitation criteria.[262]

One unusual case concerned a situation where a source selection authority was unable to make a reasonable decision when two proposals were evaluated as totally equal. The Comptroller General examined both offers carefully and agreed that the SSA had to find an appropriate discriminator. In this case, they consisted of two factors: the disruptive effects and cost consequences of not awarding to an incumbent contractor, and the status of one offeror as a labor surplus area concern, neither of which were encompassed in the RFP. The Comptroller General explained his reasoning:

> When, however, competing proposals are measured against the evaluation factors established for the procurement and the source selection official, in the good faith exercise of the discretion vested in h'm, is unable to discern an appropriate choice on the basis of that evaluation, we think that official properly may take into account other factors which are rationally related to a selection decision for the particular procurement involved.[264]

On occasion, proposals are rated equal in technical merit by evaluation personnel. When this occurs, cost/price can become the determinative factor notwithstanding the fact that technical factors are stated in the solicitation to be of primary importance. This situation often gives rise to protests alleging that cost/price has thus been given more weight than disclosed in the solicitation. In

addressing such allegations, the Comptroller General has held that the utilization of cost/price as the determinative factor in such instances does not mean the agency has altered the relative importance of their disclosed criteria.[265]

In one protest, an RFP indicated technical considerations were worth 85 points while price was valued at 35 points.[266] Also, it stated award would be made to the technically acceptable proposal offering the most advantageous technical/cost relationship, i.e., not to the highest point score attained by an offeror. The agency determined two offers were essentially equal technically, and awarded to the offeror with the lowest proposed price. Rejecting a contention that there was a change in the stated evaluation criteria as a result of that action, the Comptroller General related:

> In any case where cost is designated as a relatively unimportant evaluation factor, it may nevertheless become the determinative factor when application of the other, more important factors do not, in the good faith judgments of source selection officials, clearly delineate a proposal which would be most advantageous to the Government to accept.[267]

However, such determinations of equality of proposals must be supported in the evaluation record. Thus, HEW was criticized in 1979 for failing to provide a factual explanation why a review committee concluded a difference of 11.75 points out of 100 rendered two proposals essentially equal in technical merit.[268] The Comptroller General found

the mere inclusion of conclusionary statements to be unacceptable.

Finally, offerors have found that the general rule in this area may work against them. The Comptroller General dismissed a contention that an awardee's proposal should have been rejected because it didn't meet certain alleged requirements when he found that the RFP in fact imposed no such requirements and that HEW applied proper criteria in their evaluation.[269]

B. Rationality

Assuming established and disclosed factors have been consistently applied, agency source selections must meet the test of rationality. Once again, the Source Selection Official or Authority is vested with wide discretion and is not bound by the rankings or recommendations (if any) provided by evaluation boards, as long as there is a rational basis for the decision.[270] Point spreads, as we have seen, are guides for the source selection officials, and the fact that an agency may have used a numerical scoring system and assigned somewhat different scores to competing proposals doesn't mean a higher rated proposal must be viewed as offering any significant technical advantage.[271] Therefore, a point spread of 99.5, 96.0 and 93.8 out of a possible 100 points was properly deemed to be "substantially equal" by source selection personnel.[272]

Indeed, even if technical evaluators unanimously recommend award, the source selection official may nevertheless exercise his discretion and choose a different offeror as long as he has a reasonable basis and is consistent with evaluation criteria.[273]

In any case, the procurement record must clearly show that there was in fact a rational basis for the award decision. Thus, one record was insufficient where it contained no indication of the reasoning process underlying the bare conclusions of the third of three evaluators, whose views prompted the final selection, and where those views conflicted with the technical evaluation committee's views.[274] The extent of such justification necessary to support an award obviously varies with the circumstances of the particular procurement. For example, when there is only a slight difference in technical scores, the fact that a lower rated offeror submitted a substantially lower cost proposal may in itself be adequate to support an award.[275] Sometimes the technical evaluation reports themselves may provide sufficient justification,[276] while other justifications require detailed analysis.[277] In that regard, a protest was sustained where two offerors were rated in technical excellence at 97 and 87 out of a possible 100 points, and at 17 and 20, respectively, out of a possible 20 points for cost.[278] Award was made to the less expensive offeror, even though he was rated lower technically. The protestor argued that such a decision made

price the primary consideration, rather than technical excellence, as was stated in the solicitation. The Contracting Officer replied that the technical scores indicated only a "slight difference" between offerors. However, the record only contained the composite score sheets for the SEB members, with no individual ratings or narrative summaries. The Comptroller General found such a record to be insufficient to establish the rationality of the Contracting Officer's decision that the 10 point differential was insubstantial. Finally, a selection may be unreasonable on its face, as where award is made to an offeror whose technical proposal was 5% higher, but whose price was 4 1/2 times higher.[279]

As for the agency regulations examined in this review, they offer little instruction regarding the actual selection decision. AFR 70-15 simply requires that the selection decision be incorporated into a "Source Selection Decision Document" which must contain a detailed rationale for the selection.[280] The Army points out that the SSA is not bound by the "findings, scoring, and recommendations of lower level review bodies and officials."[281] The limits on the SSA's discretion are said to be that the award decision must have "a rational basis in terms of the evaluation factors in the RFP, and all the legal and procedural requirements of the evaluation process must be met..."[282] Also, the final decision should not be based on "numerical, adjectival or other scores, rather, it should be based upon

the relative strengths and weaknesses of the competing proposals."[283] NASA provides that:

> In the final analysis, NASA judgment on the totality of the evaluation will be that of the Source Selection Official. This includes assessment of the procedures followed by the Board, the validity of its substantive evaluations, the relative significance of the several areas of the evaluation, and the weightings previously assigned by the SEB, in the light of all the information produced by the source evaluation and selection process. The Source Selection Official will select the contractor (or contractors) which he considers can perform the contract in a manner most advantageous to the Government.[284]

Obviously, one can only describe agency discretion in so many ways.

While allegations of irrationality may be found in areas other than cost, such as the RCA protest cited in Chapter II, the inherent problems of cost/technical trade-offs provide the most fertile grounds for protests against agency selections. The extent to which such trade-offs may be made is governed by the evaluation scheme set forth in the solicitation.[285] Where cost and technical factors are afforded substantially equal weight, award to a higher cost, higher technically rated offer is proper when it reasonably provides a better value to the Government.[286] Thus, there were no grounds to protest a case where cost and technical factors were rated equally, and the awardee's cost was 2.4% higher than the protester's, but at the same time 44.9% higher technically.[287]

As was discussed previously, cost considerations can become determinative, even though of minimal relative importance, where proposals are evaluated as being technically equal. Again, such determinations of equality must likewise be supported as reasonable and rational.[288] As such, where a solicitation places emphasis on technical merit, and the record doesn't justify the "essentially equal" determination, award based upon lower estimated cost is improper.[289] In that regard, the Comptroller General has stated:

> We believe that implicit in the language of the RFP that "cost will be considered secondary to technical merit", is an invitation to offerors to propose the use of methods, facilities and resources which they believe will best accomplish the desired result, not necessarily at lowest cost, but a cost to the Government which is fair and reasonable.[290]

C. Discretion: A Final Word

This review began by examining the RCA protest in detail in order to gain an overview of the source selection system and its binding thread: agency discretion. Not surprisingly, this review could be ended by citing the RCA case. Many aspects of the source selection process have been dealt with in this review, all linked by a common denominator. The decisional discretion vested in procuring agency officials is real and extensive. No better summarization of

the range of that discretion can be found than that set forth by the Comptroller General in the protest of Grey Advertising, Inc., where he stated:

> [We] have consistently stated that "technical point ratings are useful as guides for intelligent decision-making in the procurement process, but whether a given point spread between two competing proposals indicates the significant superiority of one proposal over another depends upon the facts and circumstances of each procurement and is primarily a matter within the discretion of the procuring agency. 52 Comp. Gen. 686,690 (1973); 52 id. 738, 747 (1973); ILC Dover, B-182104, November 29, 1974, 74-2 CPD 301; Tracor Jitco, Inc., 54 Comp. Gen. 896 (1975), 75-1 CPD 253; Management Services Incorporated, B-184606, February 5, 1976, 55 Comp. Gen. __, 76-1 CPD 74. As we said in Tracor Jitco, Inc., supra:
>
> > "* * * Uniformly, we have agreed with the exercise of the administrative discretion involved--in the absence of a clear showing that the exercised discretion was not rationally founded--as to whether a given technical point spread between competitive-range offerors showed that the higher-scored proposal was technically superior. On a finding that technical superiority was shown by the point spread and accompanying technical narrative, we have upheld awards to concerns submitting superior proposals, although the awards were made at costs higher than those proposed in technically inferior proposals. 52 Comp. Gen. 358 (1972); B-171696, July 20, 1971; B-170633, May 3, 1971. Similarly, on a finding that the point score and technical narrative did not indicate superiority in the high-ranked proposal, we have upheld awards to offerors submitting less costly, albeit lower-scored technical proposals. See 52 Comp. Gen. 686 (1973); 50 id., supra. This

> reflects our view that the procuring agency's evaluation of proposed costs and technical approaches are entitled to great weight since the agencies are in the best position to determine realism of costs and corresponding technical approaches. Matter of Raytheon Company, 54 Comp. Gen. 169 (1974); 50 id. 390 (1970). Our practice of deferring to the agency involved in cost/technical trade-off judgments has been followed even when the agency official ultimately responsible for selecting the successful contractor disagreed with an assessment of technical superiority made by a working level evaluation committee. See B-173137(1), October 8, 1971. Our review of the subject award, therefore, is limited to deciding whether the record reasonably supports a conclusion that the award was rationally founded. See Matter of Vinnell Corporation, B-180557, October 8, 1974." 54 Comp. Gen. at 898-9.

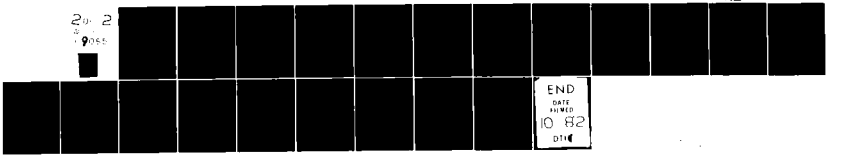
We believe it is clear from these cases that the question of whether a difference in point scores is for determination on the basis of both what the difference might mean in terms of performance and what it would cost the Government to take advantage of it. As we said in 52 Comp. Gen. 358 (1972), the "determinative element * * * [is] not the difference in technical merit scores per se, but the considered judgment of the procuring agency concerning the significance of that difference." 52 Comp. Gen. at 365. Thus, for example, in B-173137(1), October 8, 1971, where it was determined that two firms were technically equal despite one firm's technical point score edge of 15.8 points (on a 100 point scale), we viewed the award to the lower-scored competing firm "as evidencing a determination that the cost premium involved in making an award to [the higher-rated] firm would not be justified in light of the acceptable level of technical competence available at somewhat lower cost." See also 50 Comp. Gen. 246 (1970), in which we expressed similar views in upholding award to a firm receiving a

point score that was 6 points (out of 100) lower than that received by a competitor. Also, in ILC Dover, supra, we upheld a contracting officer's determination that a point spread of 2.75 out of 100 "was 'insufficient in the light of the substantially higher cost' associated with the protester's proposal."

On the other hand, we have upheld an award to a high-rated (14 points out of 100) offeror with significantly higher proposed costs because we viewed the award "as reflecting a determination that the cost premium involved was justified taking into account the significant technical superiority of [the winning offeror's] proposal." B-170181, February 22, 1971. See also 52 Comp. Gen 358, supra (where technically superior offeror was rated 3 points higher than a competing firm); Riggins & Williamson Machine Company, Incorporated, et al., 54 Comp. Gen. 783 (1975), 75-1 CPD 783; Planning Research Corporation, B-182962, July 15, 1975, 75-2 CPD 37; Bellmore Johnson Tool Company, B-179030, January 24, 1974, 74-1 CPD 26. However, where award was made to an offeror whose technical proposal was scored about 5 percent higher than a competitor's technical proposal but whose price was approximately four-and-one-half times higher, we said the record did not indicate that the technical superiority of the one offeror "warranted an award to him at a substantially high price" and that therefore the record did not support the conclusion that the award made was most advantageous to the Government. Design Concepts, Inc., B-184658, January 23, 1976, 76-1 CPD 39.

Furthermore, while point scores, technical evaluation narratives, and adjective ratings may well be indicative of whether one proposal is technically superior to another and should therefore be considered by source selection officials, see EPSCO, Incorporated, B-183816, November 21, 1975, 55 Comp. Gen.___, 75-2 CPD 338, we have recognized that selection officials are not bound by the recommendations made by evaluation and advisory groups. Bell

AD-A119 085 AIR FORCE INST OF TECH WRIGHT-PATTERSON AFB OH F/G 5/1
FEDERAL SOURCE SELECTION PROCEDURES IN COMPETITIVE NEGOTIATED A--ETC(U)
MAY 82 J C BABIN
UNCLASSIFIED AFIT/CI/NR/82-42T NL



Aerospace Company, 55 Comp. Gen. 244 (1975), 75-2 CPD 168; Tracor Jitco, Inc., supra; 51 Comp. Gen. 272 (1971); B-173137(1), supra. This is so even though it is the working level procurement officials and evaluation panel members who may normally be expected to have the technical expertise relevant to the technical evaluation of proposals.

Accordingly, we have upheld source selection officials' determinations that technical proposals were essentially equal despite an evaluation point score differential or 81 out of 1000, see 52 Comp. Gen. 686, supra, and despite contracting officer recommendations that award be made to the offeror with the highest technical rating. See 52 Comp. Gen. 738, supra.

As indicated by the foregoing, source selection decision-making is vested in the "considerable range of judgment and discretion" of the selection officials, EPSCO, Incorporated, supra, who have a "very broad degree of discretion * * * in determining the manner and extent to which [they] will make use of technical evaluation results." Department of Labor Day Care Parents' Association, 54 Comp. Gen. 1035, 1040 (1975), 75-1 CPD 353. In exercising that discretion, they are subject only to the tests of rationality (see Tracor Jitco, Inc., supra, where we questioned the selection decision as not "rationally justified" but ultimately found in a later decision on the basis of a subsequent submission from the procuring agency, that the selection decision was supportable. 55 Comp. Gen. 499 (1975), 75-2 CPD 344) and consistency with established evaluation factors. See EPSCO, Incorporated, supra.[291]

CHAPTER V

CONCLUSION

We have seen that Federal Government procurement officials have a great deal of discretion throughout the entire source selection process. That discretion is recognized by contracting agencies and by the Comptroller General. Yet, in spite of this recognition, protests against competitive source selections proliferate.

In the overall view of the source selection process, it would seem that procuring agencies should want to create a selection system which is, of course, fair, which maximizes competition, and which also lessens the probability of protests. In examining the many protests across the spectrum of the entire source selection process, two things are apparent.

First, ironically, it appears that the more objectivity present in the selection system, the more likely protests will occur. That is, given the discretion of the source selection official in making his final decision, as the degree of objectivity rises in the evaluation system, offerors are more apt, or perhaps possess more fertile grounds, to object to selection decisions which differ from, or appear to differ from, evaluation results. Thus, protests involving all aspects of numerical formulae evaluations abound. Indeed, notwithstanding accepted agency

discretion, it is not an easy task to convince an offeror who has spent a significant sum of money just preparing an offer that all of those elaborate, sophisticated evaluation procedures, which are often resplendent with highly qualified evaluators, should not really be binding. Nevertheless, the inherently complex nature of Government negotiated procurements certainly requires at least some form or degree of final discretion. In establishing a selection system, who can really say that cost, or responsibility-type criteria are worth 20 points, 30 points, or 100 points? Surely it can be accepted that Government officials have reason and intelligence enough to decide whether or not given differences in estimated costs can outweigh a relatively small superiority in technical merit. Some procurements may lend themselves easily to objective evaluation systems. But others, particularly major acquisitions, may fare better with a higher degree of subjectivity. Perhaps the Air Force has recognized this in their likely emphasis on a color coding system as opposed to numerical formulae in the proposed revision of their source selection regulation, as noted previously. Ideally, at least at the major factor levels of major acquisitions, it would appear that a purely subjective, rational system, applied in accordance with both disclosed criteria and a disclosed evaluation scheme, might provide less fertile grounds for protests against awards, while at the same time maintain the requisite fairness and competitiveness.

The second apparent general cause of many protests concerns the elements of disclosure. It should be a fundamental proposition that a buyer should tell the seller exactly what he wants to buy. In other words, to insure that he receives a product which will best satisfy his needs, the buyer should be as specific as possible in describing those needs to the seller. In spite of what should be a fundamental proposition, we have seen that procuring agencies have historically been reluctant to disclose many aspects of their selection system, which, in essence, will determine whether or not the product is in fact appropriate. As noted, only two agencies surveyed recommended disclosure of the evaluation method to be utilized. A classic example of what appears to be a rule without a valid purpose is the DAR's prohibition against disclosure of numerical weights. Logically, it would seem that by revealing those weights, offerors would be able to concentrate their efforts in the most important areas of the procurement. Further, disclosure of numerical weights might also serve to reduce protests. Because of the prohibition, offerors normally learn of the precise weights during post-award debriefings. Under the Comptroller General's bid protest rules, protests based upon alleged defects in the solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to such closing date; otherwise, protests must be filed not later than 10 days after the basis for the protest becomes known,

or should have become known, whichever is earlier.[292] If the numerical weights were disclosed in the solicitation, protests based upon those weights would normally be denied as untimely if filed after the closing date. As such, the prospective offeror must make his decision during the initial stages of the competition. Also, in the final analysis, disclosure of those weights would certainly not be detrimental to the overall integrity of the procurement process. Further, the recurrent fear that agencies will lose their discretion if offerors, with knowledge of precise weights, are able to "play" with the system, is unfounded. We have already seen that source selection officials are not bound by the recommendations or findings of evaluation personnel, as long as the selection decision has a rational basis.

In summary then, procuring agencies might find it worthwhile to inject as much subjectivity into source evaluation and selection systems as practicable, and, once that system is chosen, to disclose it in detail. When the process is complete, the requisite rational basis for the selection decision could then be clearly set forth in a selection document for the edification of all interested parties.

FOOTNOTES

1. Lorette, Major Acquisition Problems, Policy and Research, 10 NAT. CONT. MGT. J.1 (Winter 76-77).

2. M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971)

3. Department of Defense Directive 5000.1, Major Systems Acquisitions, March 19, 1980.

4. Air Force Regulation 70-15 (AFR 70-15), April 16, 1976, para. 1-1(a).

5. Id. para. 1-1(b).

6. Headquarters, Department of the Army Regulation 715-6 (AF 715-6), September 21, 1970, para. 2.

7. Headquarters, U.S. Army Materiel Development and Readiness Command Pamphlet 715-3 (DARCOM P 715-3), October, 1980, Foreword.

8. Headquarters, Naval Material Command Instruction 4200.49 (NAVMAT INST. 4200.49), February 28, 1977, para. 1.

9. Id. at para. 3.

10. U.S. Department of Energy, Procurement Regulations Handbook, Source Evaluation Board (DOE/PR-0027), June 30, 1979, Foreword.

11. National Aeronautics and Space Administration, Source Evaluation Board Manual (NHB 5103.6A), December, 1975, Foreword, para. 6.

12. Augmentation, Inc., Comp. Gen. Dec. B-186014, 76-2 CPD ¶235 (1976).

13. 51 Comp. Gen. 272 (1971).

14. Id. at 273.

15. Id. at 274.

16. Id. at 278.

17. Id. at 283.

18. Id. at 282, 283.

19. Rudoph F. Matzer & Associates v. Warner, 348 F. Supp. 991 (M.D. Fla. 1972).

20. 55 Comp. Gen. 1362 (1976).

21. 56 Comp. Gen. 649 (2977).

22. Tyco, Comp. Gen. Dec. B-194763, B-195072, August 16, 1979, 79-2 CPD ¶126.

23. Metis Corporation, Comp. Gen. Dec. B-181387, January 24, 1975, 75-1 CPD ¶144.

24. On-Line Systems, Inc., Comp. Gen. Dec. B-193126, March 28, 1979, 79-1 CPD ¶208.

25. Metis Corporation, supra note 23; see also 46 Comp. Gen. 606 (1967).

26. Particle Data, Inc.; Coulter Electronics, Inc., Comp. Gen. Dec. B-179762, B-178718, May 15, 1979, 74-1 CPD ¶257.

27. Norfolk Shipbuilding and Drydock Corp., Comp. Gen. Dec. B-200668, January 27, 1981, 81-1 CPD ¶46.

28. Interservice Systems, Inc.; Cencom Systems, Inc., Comp. Gen. Dec. B-195773, B-195773.2, May 8, 1980, 80-1 CPD ¶332.

29. Id. at 8.

30. AFR 70-15, supra note 4, at para. 3-2(d).

31. Id. at para. 3-3.

32. Id. at para. 3-3c(2).

33. Id. at para. 2-4d.

34. Id. at apra. 3-3e(1).

35. Id. at para. 3-4a.

36. DARCOM P 715-3, supra, note 7, at para. 4-3.

37. Id. at para. 4-3b(1).

38. 41 C.F.R. §3-3.5102(d) (1980).

39. DOE/PR-0027, supra, note 10, at para. 205(c).

40. NHB 5103.6A, supra, note 11, at para. 200.5(a) and 403.2(b).

41. Id., at para. 200.5(b) and 403.2(c).

42. Id., at para. 200.5(c) and 403.2(d).

43. Id., at para. 200.5(d) and 403.2(e).

44. 10 U.S.C. §2304(g) (1976).

45. DOT Systems, Inc., Comp. Gen. Dec., B-185558, August 26, 1976, 76-2 CPD ¶186.

46. Computer Data Systems, Inc., Comp. Gen. Dec. B-187892, June 2, 1977, 77-1 CPD ¶384; see also Informatics, Inc., Comp. Gen. Dec. B-194734, 79-2 CPD ¶144 (1979).

47. Philips Business Systems, Inc., Comp. Gen. Dec. B-194477, April 9, 1980, 80-1 CPD ¶264.

48. Department of Defense Directive 4105.62, Selection of Contractual Sources for Major Defense Systems (DODD 4105.62), January 6, 1976, para. C(2)b(1); see also Department of Defense Directive 5000.28, Design to Cost, May 23, 1975.

49. AFR 70-15, supra note 4, at para. 1-3(1).

50. Hasko-Air, Inc., Comp. Gen. Dec. B-192488, March 19, 1979, 79-1 CPD ¶190.

51. DODD 4105.62, supra, note 45, at para. D(1).

52. NHB 5103.6A, supra, note 39.

53. DOE/PR-0027, supra, note 10, at para. 202(b)4.

54. 41 C.F.R. §3-3.5102(c) (1980).

55. Headquarters, Air Force Systems Command, Supplement 1, AFR 70-15 (AFSC Sup 1), February 18, 1977, para. 1-3(A)(J).

56. Id., at para. 1-4(I)(1).

57. Joule Technical Corporation, Comp. Gen. Dec. B-197249, September 30, 1980, 80-2 CPD ¶231; see also Exide Power Systems Division, ESD, Inc., 57 Comp. Gen. 653 (1978), 78-2 CPD ¶106.

58. SBD Computer Services Corporation, Comp. Gen. Dec. B-186950, December 21, 1976, 76-2 CPD ¶511.

59. Id., at 5.

60. Honor Guard Security Services, Comp. Gen. Dec. B-193633, August 29, 1979, 79-2 CPD ¶163.

61. Contra Costa Electric, Inc., Comp. Gen. Dec. B-200660, March 16, 1981, 81-1 CPD ¶196.

62. New Hampshire-Vermont Health Service, Comp. Gen. Dec. B-189603, March 15, 1978, 78-1 CPD ¶202.

63. 48 Comp. Gen. 314 (1968).

64. AFR 70-15, supra, note 4, at para. 1-7; NAVMAT INST. 4200.49, supra, note 8, at para. 5; AR 715-6, supra, note 6, at para. 6.

65. AFR 70-15, supra, note 4, at para. 3-14; NAVMAT INST. 4200.49, supra, note 8, at para. 9; DARCOM P 715-3, supra, note 7, at para. 3-11.

66. AFR 70-15, supra, note 4, at para. 3-15; NAVMAT INST. 4200.49, supra, note 8, at para. 9; DARCOM P 715-3, supra, note 7, at para. 3-12.

67. DODD 4105.62, supra, note 48, at para. III A(4).

68. Naval Sea Systems Command Instruction 4200.10 (NAVSEA INST 4200.10), April 27, 1979, Enclosure 3.

69. AFSC Supp. 1, supra, note 55, at para. 1-1(c).

70. DOE/PR-0027, supra, note 10, at para. 101-103.

71. 41 C.F.R. §3-3.5102(b) (1980).

72. Department of Health and Human Services (HHS) Handbook, The Negotiated Contracting Process: A Guide for Project Officers, 1977 edition, at 15.

73. NHB 5103.6A, supra, note 11, at para. 102 and 103.

74. Id., at para. 303.

75. Carol L. Bender, M.D., Comp. Gen. Dec. B-196912, April 1, 1980, 80-1 CPD¶243.

76. Tulane University, Comp. Gen. Dec. B-193012, May 1, 1980, 80-1 CPD ¶309.

77. Maximus, Comp. Gen. Dec. B-195806, April 15, 1981, 81-1 CPD ¶285.

78. Design Concepts, Inc., Comp. Gen. Dec. B-186125, October 27, 1976, 76-2 CPD ¶365.

79. Pacificon Productions, Inc., Comp. Gen. Dec. B-196371, July 22, 1980, 80-2 CPD ¶58.

80. See, e.g., 41 C.F.R. §3-3.5103(a) (1980).

81. David A. Clary, Comp. Gen. Dec. B-200877, April 2, 1981, 81-1 CPD ¶326.

82. 50 Comp. Gen. 391 (1970).

83. Washington School of Psychiatry, Comp. Gen. Dec. B-189702, May 7, 1978, 78-1 CPD ¶176.

84. Pacific Consultants, Inc., Comp. Gen. Dec. B-198706, August 18, 1980, 80-2 CPD ¶129.

85. University of New Orleans, Comp. Gen. Dec. B-184194, May 26, 1978, 78-1 CPD ¶401.

86. Fox and Company, Comp. Gen. Dec. B-197272, November 6, 1980, 80-2 CPD ¶340.

87. University of New Orleans, supra, note 85.

88. See 18 U.S.C. §§203, 205, 208; Department of Defense Instruction 5500.7, July 19, 1977; 5 C.F.R. Part 735.

89. See, e.g., AFR 70-15, supra, note 4, at para. 1-13, where all persons involved in the source selection process are required to be briefed on the Air Force regulation covering standards of conduct, and are instructed to inform certain supervisors whether their participation might embarass the Government because of "real, apparent or possible conflict of interest"; see also DODD 4105.62, supra, note 45, at para. 10.

90. Development Associates, Inc., Comp. Gen. Dec. B-187756, May 5, 977, 77-1 CPD ¶310.

91. Burgos and Associates, Inc., Comp. Gen. Dec. B-195839, February 25, 1980, 80-1 CPD ¶155.

92. Ackco, Inc., Comp. Gen. Dec. B-184518, Sept. 19, 1976, 76-2 CPD ¶239.

93. Del Rio Flying Service, Inc., Comp. Gen. Dec. B-197448, August 6, 1980, 80-2 CPD ¶92.

94. Monchik-Weber Associates, Inc., Comp. Gen. Dec. B-196433, August 8, 1980, 80-2 CPD ¶102.

95. Robinson Industries, Inc., Comp. Gen. Dec. B-194157, January 8, 1980, 80-1 CPD ¶20.

96. Edward E. Davis Contracting, Inc., Comp. Gen. Dec. B-199542, January 13, 1981, 81-1 CPD ¶20.

97. EPSCO, Incorporated, Comp. Gen. Dec. B-183816, November 21, 1975, 75-2 CPD ¶338; see also Department of Labor Day Care Parents Association, 54 Comp. Gen. 1035, 75-1 CPD ¶353 (1975).

98. Olin Corporation, Energy Systems Operations, Comp. Gen. Dec. B-187311, January 27, 1977, 77-1 CPD ¶68.

99. TGI Construction Company, et. al., 54 Comp. Gen. 755, 75-1 CPD ¶167 (1975); Decision Sciences Corporation, Comp. Gen. Dec. B-182550, March 24, 1975, 75-1 CPD ¶175.

100. Joanell Laboratories, Incorporated, Comp. Gen. Dec. B-187547, January 25, 1977, 77-1 CPD ¶51.

101. Sogitec, Incorporated, Comp. Gen. Dec. B-196158, January 24, 1980, 80-1 CPD ¶70.

102. Raytheon Company, 54 Comp. Gen. 169 (1974), 74-2 CPD ¶137.

103. 53 Comp. Gen. 240 (1973).

104. Decilog, Comp. Gen. Dec. B-198614, Sept 3, 1980, 80-2 CPD ¶169.

105. Teledyne Lewisburg, Oklahoma Aerotronics, Comp. Gen. Dec. B-183704, October 10, 1975, 75-2 CPD ¶228.

106. Pacific Consultants, Inc., supra, note 84.

107. Id., at 7.

108. Grey Advertising, Inc., 55 Comp. Gen. 1111, 76-1 CPD ¶325 (1976); see also Tracor-Jitco, Inc., 54 Comp. Gen. 896, 75-1 CPD ¶253 (1975).

109. 52 Comp. Gen. 382 (1972).

110. Metropolitan Contract Services, Inc., Comp. Gen. Dec. B-191162, June 14, 1978, 78-1 CPD ¶435.

111. Maximus, supra, note 77.

112. AFR 70-15, supra, note 4, at para. 3-10(c).

113. Id., at para. 3-8(a).

114. Id., at para. 3-10(c)3.

115. Id., at para. 3-10(d)1.

116. Id., at para. 3-10(d)2.

117. Id., at para. 3-10(e).

118. Id., at para. 3-10(e)1.

119. Id., at para. 3-10(e)2.

120. Id., at para. 3-10(e)3.

121. Id., at para. 3-10(e)4.

122. Id.

123. Id., at para. 3-10(e)5.

124. Id., at para. 3-10(e)6.

125. Id., at para. 3-10(f).

126. Marine Management Systems, Inc., Comp. Gen. Dec. B-185860, Sept 14, 1976, 76-2 CPD ¶24[illegible].

127. Francis & Jackson Associates, Comp. Gen. Dec. B-190023, January 31, 1978, 78-1 CPS ¶79.

128. Maximus, supra, note 77.

129. Decision Sciences Corporation, Comp. Gen. Dec. B-182558, March 24, 1975, 75-1 CPD ¶175.

130. Bunker Ramo Corporation 56 Comp. Gen. 712, 77-1 CPD ¶427 (1977).

131. 52 Comp. Gen. 198 (1972).

132. DOE/PR 0027, supra, note 10, at para. 306(b).

133. Id.

134. Id., at para. 404(e).

135. Fox & Company, supra, note 86.

136. NHB 5103.6A, supra, note 11, at para. 201.2(a).

137. Id., at para. 201.2(b).

138. Id.

139. DARCOM P 715-3, supra, note 7, at para. 4-4(b)7(a).

140. AFR 70-15, supra, note 4, at para. 3-11.

141. Id., at para. 3-11(a)2 and (b).

142. Id., at para 3-11(c).

143. Interview with Mr. Daniel J. Rak, Asst. Gen. Counsel, Procurement, Office of the General Counsel, Secretary of the Air Force, on June 10, 1981. In addition to his role as Asst. General Counsel, Mr. Rak is a member of all major system acquisitions SSAC's convened by the Air Force.

144. DARCOM P 715-3, supra, note 7, at para. 3-9(b).

145. Id., at para. 3-10(d)5.

146. Id., at para. 4-5(b).

147. Id.

148. Id., at para. 4-5(c).

149. Id.

150. Naval Electronic Systems Command Instruction 4200.12C (NAVELEX Inst. 4200.12C), para. 13(a).

151. Id., at Enclosure 3.

152. Donald N. Humphries & Associates, et. al., 55 Comp. Gen. 430 (1975), 75-2 CPD ¶275.

153. Comprehensive Health Services, Inc., Comp. Gen. Dec. B-198410, August 25, 1980, 80-2 CPD ¶148.

154. Design Concepts, Inc., Comp. Gen. Dec. B-106880, December 22, 1976, 76-2 CPD ¶552.

155. Id.

156. Group Hospital Service, Inc. (Blue Cross of Texas), Comp. Gen. Dec. B-190401, Feb 6, 1979, 79-1 CPD ¶245.

157. Shapell Government Housing, Inc., 55 Comp. Gen. 839, 76-1 CPD ¶161 (1976); Corbetta Construction Co., 55 Comp. Gen. 201, 75-2 CPD ¶149 (1975).

158. DARCOM P 715-3, supra, note 7, at para. 4-6(c)3.

159. Id.

160. Shapell, supra, note 157, Corbetta, supra, note 157.

161. Shapell, supra, note 157.

162. Design Concept, Inc., supra, note 78; DOT Systems, Inc., supra, note 45.

163. First Ann Arbor Corporation, Comp. Gen. Dec. B-194519, March 4, 1980, 80-1 CPD ¶120, 4.

164. Id., at 9; see also Sheldon G. Kall, Comp. Gen. Dec. B-199120, Sept 23, 1980, 80-2 CPD ¶221.

165. W. S. Gookin & Associates, Comp. Gen. Dec. B-188474, August 25, 1977, 77-2 CPD ¶146.

166. Group Operations, Incorporated, Comp. Gen. Dec. B-185871, 55 Comp. Gen. 1315 (1976), 76-2 CPD ¶79.

167. Umpqua Research Company, Comp. Gen. Dec. B-199014, August 3, 1981, 81-1 CPD ¶254.

168. For another recent example, see New Jersey Association on Correction, Comp. Gen. Dec. B-199680, April 9, 1981, 81-1 CPD ¶272.

169. DAR 3-807.1(d); FPR 1-3.807-2(a); NASA PR 3-807-1(d).

170. Id.

171. DAR 3-807.2(a) and (b); FPR 1-3.807-2(b) and (c); NASA PR 3.807-2(a) and (b).

172. AFR 70-15, supra, note 4, at para. 3-8.

173. NHB 5103.6A, supra, note 11, at para. 202.1

174. Pioneer Contract Services, Inc., Comp. Gen. Dec. B-197245, Feb. 19, 1981, 81-1 CPD ¶107.

175. Grey Advertising, Inc., supra, note 108.

176. Signatron, Inc., 54 Comp. Gen. 530, 74-2 CPD ¶386 (1974); DAR 339.

177. Joule Technical Corporation, Comp. Gen. Dec. B-192125, May 21, 1979, 79-1 CPD ¶364.

178. University Research Corporation, Comp. Gen. Dec. B-196246, January 28, 1981, 81-1 CPD ¶50.

179. University Research, Comp. Gen. Dec. B-186311, August 26, 1976, 76-2 CPD ¶188.

180. Group Operations, Incorporated, Comp. Gen. Dec. B-185871, July 26, 1976, 76-2 CPD ¶79.

181. DOT Systems, Inc., supra, note 45.

182. 52 Comp. Gen. 870 (1973).

183. Vinnell Corp., Comp. Gen. Dec. B-180557, 74-2 CPD ¶190 (1974).

184. Dynalectron Corporation, Lockheed Electronics Company, Inc., 54 Comp. Gen. 562, 574, 75-1 CPD ¶17 (1975).

185. Id., at 575.

186. Raytheon Company, 54 Comp. Gen. 169, 74-1 CPD ¶137 (1974).

187. Lockheed Propulsion Company, et. al., 53 Comp. Gen. 977, 74-1 CPD ¶339 (1974).

188. Moshman Associates, Inc., Comp. Gen. Dec. B-192008, 79-1 CPD ¶23 (1979).

189. Bell Aerospace Co., 55 Comp. Gen. 244, 75-2 CPD ¶168 (1975).

190. 44 Comp. Gen. 439, 442 (1965).

191. 48 Comp. Gen. 314, 319 (1968).

192. 49 Comp. Gen. 229 (1969).

193. Id., at 230.

194. Id.

195. 50 Comp. Gen. 59 (1970).

196. Tracor, Inc., Comp. Gen. Dec. B-186315, November 8, 1976, 76-2 CPD ¶386.

197. DODD 4105.62, supra, note 48, at para. IIIc(2)(f)(1).

198. AFR 70-15, supra, note 4, at para. 3-2a(3).

199. DARCOM P 715-3, supra, note 7, at para. 4-4(b)(7)(b).

200. NAVMAT INST. 4200.49, supra, note 8, at para. 7(a).

201. DARCOM P 715-3, supra, note 199.

202. 41 C.F.R. §3-3.5102(e).

203. DOE/PR 0027, supra, note 10, at para. 202(b).

204. NASA PR, at para. 3.501(b)(I)(D)(1).

205. NHB 5103.6A, supra, note 11, at para. 403.2(b).

206. DOE/PR 0027, supra, note 10, at para. 202(b).

207. 52 Comp. Gen. 686 (1973).

208. University Research Corporation, Comp. Gen. Dec. B-196246, January 28, 1981, 81-1 CPD ¶50.

209. Id., at 3.

210. Sperry Rand Corporation, Comp. Gen. Dec. B-179875, September 12, 1974, 74-2 CPD ¶158.

211. BDM Services Company, Comp. Gen. Dec. B-186245, May 9, 1974, 74-1 CPD ¶237.

212. Id., at 3.

213. Id., at 7-8.

214. Bayshore Systems Corporation, Comp. Gen. Dec. B-184446, March 2, 1976, 76-1 CPD ¶146.

215. Pacific Consultants, Inc., supra, note 84.

216. GENASYS Corporation, Comp. Gen. Dec. B-187811, July 29, 1977, 77-2 CPD ¶60.

217. Dynatrend, Inc., Comp. Gen. Dec. B-192038, January 3, 1979, 79-1 CPD ¶4.

218. 52 Comp. Gen. 161, (1972); 54 Comp. Gen. 775 (1975).

219. Signatron, Inc., supra, note 176.

220. See, for example, supra, note 198; and DOE/PR 0027, supra, note 10, at para. 206.

221. DODD 4105.62, supra, note 48, at para. C(2)(b)(1).

222. Id., at para. C(2)(b)(2).

223. AFSC Supp 1, supra, note 55, at Attachment 6.

224. A.R. & S. Enterprises, Inc., Comp. Gen. Dec. B-196518 March 12, 1980, 80-1 CPD ¶193.

225. Id., at 3; see also, H. Esmaili & Associates, Inc., Comp. Gen. Dec. B-198702, October 9, 1980, 80-2 CPD ¶263.

226. University of New Orleans, Comp. Gen. Dec. B-184194, May 26, 1978, 78-1 CPD ¶401.

227. Id., at 10.

228. Iroquois Research Institute, 55 Comp. Gen. 787, 76-1 CPD ¶123 (1976).

229. Tymshare, Inc., Comp. Gen. Dec. B-198020, October 10, 1980, 80-2 CPD ¶267.

230. Id., at 3.

231. Id.

232. NHB 5103.6A, supra, note 11, at para. 403(2)(b).

233. 50 Comp. Gen. 565 (1971); see also, The Ohio State University Research Foundation, Comp. Gen. Dec. B-190530, January 11, 1979, 79-1 CPD ¶15; Buffalo Organization for Social and Technological Innovation, Inc., Comp. Gen. Dec. B-196279, February 7, 1980, 80-1 CPD ¶107; Thomas G. Gebhard, Inc., P.E., Ph.d., Comp. Gen. Dec. B-196959, February 8, 1980, 80-1, CPD ¶115.

234. Dikewood Services Co., 56 Comp. Gen. 188 (1976), 76-2 CPD ¶520.

235. In Matter of AEL Service Corp., et. al., Comp. Gen. Dec. B-179703, April 26, 1974, 74-1 CPD ¶217.

236. Id., at 5-6.

237. NHB 5103.6A, supra, note 11, at para. 403(2)(f).

238. DARCOM Procurement Instruction 3-501, August 1981 at A-14.

239. Ridgeway Electronics, Inc., Comp. Gen. Dec. B-199557, January 13, 1981, 81-1 CPD ¶21.

240. Id., at 5-6.

241. Grey Advertising, Inc., supra, note 108.

242. Computek, Inc., et. al., 54 Comp. Gen. 1080 (1975), 75-1 CPD ¶384.

243. FPR 1-3.805-1.

244. NASA PR 3.805-1(e).

245. See, for example, AFR 70-15, supra, note 4, at para. 3-2a(3).

246. Dynalectron Corporation, Comp. Gen. Dec. B-187057, February 8, 1977, 77-1 CPD ¶95.

247. Group Operations, Incorporated, supra, note 166.

248. Frank Dominguez d.b.a. Vanir Research Company, Comp. Gen. Dec. B-197842, August 27, 1980, 80-2 CPD ¶154.

249. AM International, Inc., Comp. Gen. Dec. B-200200, April 6, 1981, 81-1 CPD ¶258.

250. Lawrence Johnson & Associates, Inc., Comp. Gen. Dec. B-196442, March 9, 1980, 80-1 CPD ¶188.

251. University of New Orleans, Comp. Gen. Dec. B-184194, January 14, 1976, 76-1 CPD ¶22.

252. Signatron, Inc., supra, note 176.

253. Am Ram Nowak Associates, Inc., Comp. Gen. Dec. B-187489, March 29, 1977, 77-1 CPD ¶219.

254. Lawrence Johnson & Associates, Inc., supra, note 250; Development Associates, Inc., Comp. Gen. Dec. B-188416, August 1, 1977, 77-2 CPD ¶64.

255. Ford Aerospace & Communications Corporation, Comp. Gen. Dec. B-200672, December 19, 1980, 80-2 CPD ¶439.

256. Ford Aerospace Comp. v. Department of the Air Force, DDC No. 80-2592, December 22, 1980.

257. Courseware, Inc., Comp. Gen. Dec. B-200731, February 25, 1981, 81-1 CPD ¶133.

258. Id., at 3.

259. PRC Energy Analysis Company, Comp. Gen. Dec. B-195858, May 20, 1980, 80-1 CPD ¶346.

260. Id., at 12.

261. Raytheon Service Company; Informative Information Systems Company, Inc., Comp. Gen. Dec. B-194928, March 25, 1980, 80-1 CPD ¶214.

262. Thomas G. Gebhard, Jr., Inc., P.E. Ph.d., supra, note 233.

263. Group Hospital Service, Inc., supra, note 156.

264. Id., at 12.

265. Computer Data Systems, Inc., Comp. Gen. Dec. B-187892, June 2, 1977, 77-1 CPD ¶384, affm'd on recon. August 2, 1977, 77-2 CPD ¶67.

266. Telecommunications Management Corporation, Comp. Gen. Dec. B-190298, January 31, 1978, 78-1 CPD ¶80.

267. Id., at 6.

268. Applied Financial Analysis, Ltd., Comp. Gen. Dec. B-194388.2, August 10, 1979, 79-1 CPD ¶113.

269. New York University, Comp. Gen. Dec. B-195792, August 18, 1980, 80-2 CPD ¶126.

270. Grey Advertising, Inc., supra, note 108.

271. Computer Data Systems, Inc. - Reconsideration, Comp. Gen. Dec. B-187892, August 7, 1977, 77-2 CPD ¶67.

272. Id.

273. Trilon Educational Corporation, Comp. Gen. Dec. B-197002, June 5, 1980, 80-1 CPD ¶389.

274. Tracor Jitco, Inc., Comp. Gen. Dec. B-182213, April 23, 1975, 75-1 CPD ¶253.

275. I.L.C. Dover, Inc., Comp. Gen. Dec. B-182104, November 29, 1974, 74-2 CPD ¶301.

276. 50 Comp. Gen. 246 (1970).

277. EPSCO Incorporated, supra, note 97.

278. The University Foundation, California State University Chico, Comp. Gen. Dec. B-200608, January 30, 1981, 81-1 CPD ¶54.

279. Design Concepts, Inc., Comp. Gen. Dec. B-184658, July 23, 1976, 76-1 CPD ¶39.

280. AFR 70-15, supra, note 4, at para. 2-9(b).

281. DARCOM P 715-3, supra, note 7, at para. 3-14(c).

282. Id.

283. Id.

284. NASA PR 3.804-3(b)(1).

285. Automated Systems Corporation, Comp. Gen. Dec. B-184835, February 23, 1976, 76-1 CPD ¶124.

286. David A. Clary, Comp. Gen. Dec. B-200877, April 28, 1981, 81-1 CPD ¶326.

287. University of New Orleans, supra, note 85.

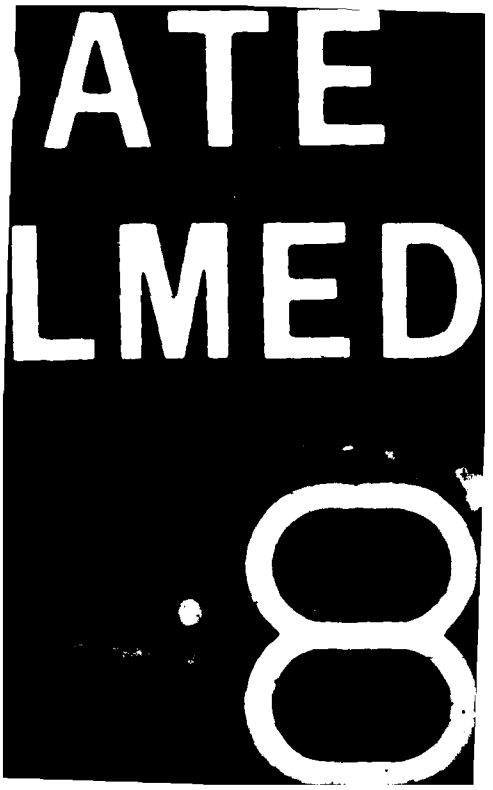
288. ABT Associates, Inc., Comp. Gen. Dec. B-196365, March 27, 1980, 80-1 CPD ¶362.

289. John Snow Public Health Group, Inc., Comp. Gen. Dec. B-196243, May 28, 1980, 80-1 CPD ¶366.

290. Id., at 5.

291. Grey Advertising, Inc., supra, note 108, at 9-12.

292. 4 C.F.R. §21.2(b) (1981).


ATE
LMED
8